2010 INDIANA FAMILY LAW UPDATE

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I. INTRODUCTION

Annotated below are the reported opinions from the Indiana Court of Appeals and Indiana Supreme Court from September 2009 to September 2010. As has become typical, during this period the Indiana Court of Appeals and Indiana Supreme Court issued far more "Not for Publication" opinions than "For Publication" opinions. The appellate courts also continued addressing recurring areas of dispute, including a material focus on termination of parental rights, judgment liens and security provisions, and a close inspection of CHINS cases. The Indiana Court of Appeals also continued its practice of providing explicit instructions on remand in several instances in order to serve judicial economy.

II. CASE LAW

A. PROPERTY DIVISION

1. *Lobb v. Hudson-Lobb*, 913 N.E.2d 288 (Ind. Ct. App. 2009). On April 23, 2004, the husband filed a petition for dissolution of marriage. On March 24, 2005, the parties orally presented a settlement agreement to the trial court. The trial court pronounced the dissolution of the parties' marriage, and ordered the husband's attorney to submit a proposed decree of dissolution of marriage. At some later date, the former marital residence was listed for sale at $339,000.00. On June 3, 2005, the wife filed a petition to enforce the oral settlement agreement and a request for an emergency hearing. On June 22, 2005, the husband executed a mortgage, secured by the former marital residence, in favor of his parents. The mortgage was recorded on July 8, 2005. On July 15, 2005, the trial court entered the decree of dissolution of marriage. The decree provided, in pertinent part, that the wife would receive payment of $167,745.50 from the husband, with $50,000.00 payable to the wife upon execution of the quitclaim deed for the former marital residence, $50,000.00 payable without interest within ninety days of the date the first of the wife's vacating the marital residence *or* the sale of the marital residence, and the balance of $67,745.50 payable by Qualified Domestic Relations Order from the husband's 401(k) account. The initial $50,000.00 installment and the 401(k) account transfer occurred, leaving a principal balance of $50,000.00 owed to the wife by the husband under the decree. On August 25, 2005, the wife's former dissolution attorney filed a notice of attorneys' lien with the trial court. On January 20, 2006, the wife filed a contempt petition for non-payment of the settlement proceeds. Proceedings supplemental occurred. On April 28, 2006, the husband executed a warranty deed, transferring his interest in the former marital residence to his parents, who purchased that real estate for the sum of $307,321.00. The deed transferring title to the husband's parents was recorded. The husband's parents had a title insurance policy from Title First Agency. On March 20, 2007, the wife filed her *lis pendens* notice, and complaint for foreclosure. On May 1, 2007, the husband's parents filed a motion to dismiss the complaint for failure to state a claim under Ind. Trial Rule 12(b)(6). On May 17, 2007, the wife filed her amended complaint for foreclosure. On April 10, 2008, the trial court held a trial on the amended complaint. The trial court found that the husband's parents had actual knowledge of the existence of the wife's judgment lien and were not *bona fide* purchasers without notice. The trial court further ordered the former marital residence to be sold, with the sum of $61,000.00 payable

to the wife in satisfaction of her judgment lien and the sum of $3,000.00 payable to the wife's former attorney. The Indiana Court of Appeals affirmed, taking the opportunity to explain the nature of a judgment lien. The Court of Appeals noted that a judgment lien is purely statutory pursuant to Ind. Code § 34-55-9-2, and that Ind. Code § 31-15-7-8 may provide for security in connection with the disposition of property in a marital dissolution action. The Court of Appeals concluded that the wife was not required to record the decree or cause the decree to be entered in the Record of Judgments and Orders. The Court of Appeals observed that the Title First Agency title insurance policy identified the decree in its judgment search, but articulated that the controlling dispositive fact was that the husband's parents had actual notice of the wife's judgment lien. A person with actual notice, the Court of Appeals declared, is bound by the terms of the instrument, even when not recorded. The Court of Appeals also noted that a trial court must take affirmative action to eliminate the creation of a judgment lien and that affirmative action did not occur in this instance.

2. *Bingley v. Bingley*, 915 N.E.2d 1006 (Ind. Ct. App. 2009), *trans. granted* 929 N.E.2d 785 (Ind. 2010). The husband was retired from Navistar Corporation at the time of filing and received a supplemental benefit as a Navistar retiree in the form of lifetime payments of his health insurance premium. The health insurance premium payments were a non-elective benefit and not subject to divesture, division, or transfer. The husband could not have elected to receive a higher monthly pension benefit in lieu of the health insurance premium payments. At trial, the wife present-valued the premium payments at $101,556.00. The trial court concluded that the husband's employer-paid, post-retirement health insurance premiums were not a marital asset subject to division. The Indiana Court of Appeals affirmed, in the process interpreting Ind. Code § 31-9-2-98 and rejecting the wife's contention that the non-forfeitability of the premium payments did not make the payments marital assets. The Court of Appeals focused on the fact that the "benefit" was not payable to the husband. The Court of Appeals also analogized to *Gnerlich v. Gnerlich*, 538 N.E.2d 285 (Ind. Ct. App. 1989) and *Antonacopulous v. Antonacopulous*, 753 N.E.2d 759 (Ind. Ct. App. 2001), and undertook an analysis of disability benefits. In reviewing those opinions, the Court of Appeals determined that purely supplemental benefits are properly excluded from the marital estate. Judge Crone concurred, but found that Ind. Code § 31-9-2-98(b) is ambiguous in its definition of "retirement benefits" and "vested". Judge Crone viewed the supplemental premium payments in this appeal as more appropriately analogous to future earnings ability.

3. *Hardebeck v. Hardebeck*, 917 N.E.2d 694 (Ind. Ct. App. 2009). The parties were married on August 18, 1965, and divorced on December 16, 2008. The Indiana Court of Appeals affirmed the trial court's verbatim adoption of the husband's proposed findings of fact and conclusions of law. *See also In Re Marriage of Nichols*, 834 N.E.2d 1091 (Ind. Ct. App. 2005). The Court of Appeals also held that a spouse's failure to file a joint tax return may or may not be considered dissipation under Ind. Code § 31-15-7-5(4), based upon a review of the facts and circumstances in each case. Relevant factors to be considered include: Whether the expenditure benefited the marriage or was made for a purpose entirely unrelated to the marriage, the timing of the traction, whether the expenditure was excessive or diminimous, and whether the dissipating party intended to hide, deplete, or divert the marital asset. The wife's refusal to file

joint tax returns out of spite provided sufficient basis for her refusal to file joint tax returns for 2006 and 2007 to constitute dissipation. Judge Kirsch concurred in part and dissented in part, opining that the wife's refusal to sign a joint tax return was consistent with both her statutory rights and prudence (as there was no evidence that the husband offered to indemnify the wife for tax liabilities on the joint returns).

4. *Leever v. Leever*, 919 N.E.2d 118 (Ind. Ct. App. 2009). The parties were married on September 16, 1977. The issue was whether real estate located at 211 North 8th Street, Elwood, Indiana, was part of the marital estate. Prior to the filing of the marital dissolution action, the husband's parents placed the real estate in the parties' names so they could enter a nursing home under Medicaid if the need arose. The trial court awarded the real estate to the husband in a constructive trust in favor of his parents, and placed no value on the real estate since the parties did not contribute to its value. The Indiana Court of Appeals affirmed in part and reversed in part, finding that the trial court properly created a constructive trust to safeguard the husband's parents' residence. The real estate, however, qualified as a "presently fixed right to future enjoyment" and should have been included in the marital estate and assigned a value. Accordingly, the Court of Appeals remanded to the trial court with instructions to assign a value to the real estate and re-divide the marital estate. Judge Riley dissented, agreeing that the real estate should be assigned a value and included in the marital estate, but commenting that the trial court should be instructed to equally divide the marital estate between the parties.

5. *Johnson v. Johnson*, 920 N.E.2d 253 (Ind. 2010). During the parties' marriage, the husband had farmed with his father. In 1992, the husband and his father entered a partnership to operate Sunset Dairy, Inc. From the beginning of the partnership, the farm used a series of lines of credit to finance its operations. Each April 15, the farm took out loans at First Source Bank to finance seasonal expenses such as fuel, chemicals, and rents. After selling the fall harvest, the farm repaid the loan. The line of credit was secured by an all-assets security agreement that was cross-collateralized with all other collateral with the bank as well as personal guarantees from the farm's owners. The bank required first position on all assets securing the farm's debt. The wife had at least a minimal role in the family business and was aware of the farm's annual financing arrangement. The parties divorced in May 2007. The parties' settlement agreement provided that the husband would pay the wife $900,000.00 plus interest. In April 2008, when the husband sought to renew his line of credit for the first time since the divorce, First Source Bank required him to obtain an agreement from the wife, ensuring her interests in the farm would not subordinate its own interests. The wife refused to sign the agreement, so the husband petitioned the trial court to subordinate her judgment lien, appoint a Commissioner to execute a subordination agreement, or suspend payments until he could obtain adequate funds to pay. The trial court granted the husband's motion. On transfer, the Indiana Supreme Court reversed. In its analysis, the Supreme Court noted that the parties agreed that the settlement agreement and decree created a judgment lien under Ind. Code § 34-55-9-2. The parties also agreed that the bank's liens securing the 2007 line of credit had priority over the wife's judgment lien because it was first in priority on the date of the parties' settlement agreement. The disagreement arose from the lines of credit entered subsequent to the date of the wife's judgment lien. The Supreme Court reasoned that the settlement agreement assumed the farm's continued operation and

financing following established patterns. However, the settlement agreement did not allow for the financing of the funds the husband was to pay the wife under the agreement. The wife impliedly agreed to subordinate her lien to the bank's lien in an amount sufficient to continue this *status quo* as respects the operation of the farm, but not to finance the divorce. An order declaring the wife's judgment lien subordinate to the lien securing the annual line of credit would not constitute a modification, but an enforcement because the settlement agreement implied the continued financing of the farm's operation. Conversely, an order subordinating the wife's lien to the bank's lien for amounts over and above such amount would constitute an impermissible modification. The Supreme Court concluded that the trial court could not compel the wife to subordinate her lien in an amount in excess of that necessary to maintain the farm's operation. The Supreme Court noted, however, that it might be in both parties' interest to negotiate an agreement allowing the husband to incur further debt to meet his divorce obligations and avoid further litigation.

6. *Hurt v. Hurt*, 920 N.E.2d 688 (Ind. Ct. App. 2010). On June 18, 2004, the parties were divorced. The decree ordered the husband to pay the wife $9,000.00. The husband subsequently filed for Chapter 13 bankruptcy, and the wife filed a claim in the amount of $9,000.00 and received $1,690.86. In July or August 2006, the parties resumed sharing a residence and paying bills jointly. On November 1, 2006, the husband began drawing monthly payments from a pension he held through his former employment with the City of Frankfort. On February 1, 2007, the husband directed that a portion of his monthly pension payment be deposited into three different accounts titled solely in the wife's name. The wife's accounts received a total of $7,502.66 from the husband's pension between February and December 2007. By January 2008, the parties had separated and the husband terminated the deposits into the wife's account. On April 3, 2008, the wife filed a contempt petition to collect the $9,000.00 owed to her under the decree. The trial court concluded that the payments the husband directed to be made into the wife's account from his pension were not intended to satisfy the $9,000.00 judgment. Taking into account interest and the payment made to the wife via bankruptcy, the trial court ordered the husband to pay the wife $10,189.14. The Indiana Court of Appeals affirmed, finding that the pension funds directed into the wife's accounts were for joint living expenses and not in satisfaction of the $9,000.00 debt under the decree.

7. *Fackler v. Powell*, 923 N.E.2d 973 (Ind. Ct. App. 2010). In the continuing saga of this case, Fackler sought review as to whether the trial court erred when it calculated the amount of prejudgment interest to which she was entitled and whether it abused its discretion when it calculated the amount of attorneys' fees her former husband was to pay. The trial court concluded that Powell was to pay Fackler a judgment balance of $31,162.20, which included interest of $6.78 per day *and* $62,284.43 of her attorneys' fees. The Indiana Court of Appeals reversed on the prejudgment interest issue, concluding that the trial court did not have discretion to deny Fackler prejudgment interest during the time period she pursued her claim in the wrong court. As to attorneys' fees, however, the Court of Appeals affirmed its order as to Powell's contributions to Fackler's attorneys' fees *and* its denial of Powell's request for attorneys' fees. On remand, the trial court was to apply the 12% prejudgment interest rate to the amount Powell owed Fackler from the date of the dissolution decree (March 22, 2002) until the date of the final

judgment (June 2, 2009) rather than apply a 12% rate until February 6, 2003, and an 8% rate thereafter.

8. *Alexander v. Alexander*, 927 N.E.2d 926 (Ind. Ct. App. 2010). The parties were married on June 12, 1976. On December 19, 2007, they separated. On December 16, 2008, the trial court began a two-day trial, where the parties presented competing evidence regarding the valuation of property. On February 5, 2009, the trial court entered its decree. On March 4, 2009, the wife filed a motion to correct error, and on March 6, 2009, the husband filed a motion to correct error. The trial court conducted a hearing on the motions to correct error on March 26, 2009, granting in part and denying in part the motions and issuing amended findings of fact and conclusions of law. The parties each appealed certain elements of the trial court's property division. The husband first contended that the trial court erred by assigning a value of $119,475.00 to Alexander and Associates. The trial court had adopted the husband's proposed valuation, but then deviated from the husband's expert by concluding that a 50% discount should be applied for negative cash flow, rather than the 85% discount proposed by the husband's expert. The husband's expert had conceded that the 85% discount for negative cash flow was a subjective determination made without any specific authority supporting such a discount. Given the competing valuation that suggested no discount for negative cash flow should be applied, the Indiana Court of Appeals determined that the trial court acted within its discretion. The husband also argued that the trial court erred by assigning a value of $125,000.00 to approximately 12.25 acres that he owned in Montgomery County and by failing to set aside that property as being non-marital property. The husband had not contended at trial that he owned $1/7^{th}$ rather than $6/7^{th}$ of this real estate, and there were competing valuations. As a result, the Court of Appeals found that the trial court acted within its discretion in adopting the $125,000.00 valuation. The husband also contended that the trial court should not have used the wife's expert's valuation of Rich Farms because the expert used a "limited appraisal" to develop his opinion. The wife's expert used four comparable sales of agricultural property for comparison pricing for the unimproved 37.35 acre tract and four sales of rural building sites for comparables for the separate 1.03 acre tract. Again, the Court of Appeals found that the trial court acted within its discretion in its valuation. The husband also contended that the trial court erroneously valued the wife's 5% interest in Bush & Bush Farms to be worth $253,670.00. Specifically the husband contended that the trial court should not have reduced the value of the wife's minority interest for lack of control and marketability. The Court of Appeals noted that it was apparent that, if the wife were required to sell her minority interest to effectuate the distribution of marital property, the interest would likely be sold to the other owners of Bush & Bush Farms rather than on the open market. Reasoning that someday the wife would either inherit a controlling interest in Bush & Bush Farms or sell her interest to the controlling interest owners of Bush & Bush Farms, the Court of Appeals nevertheless concluded that marketability discounts and minority interest discounts can be utilized by trial court in dissolution proceedings when determining the value of ownership interests such as the interest the wife held in Bush & Bush Farms. Therefore, the trial court did not abuse its discretion or commit clear error when applying marketability and minority shareholder discounts to the wife's ownership interests in Bush & Bush Farms. The Court of Appeals also rejected the husband's claim that the trial court erred by awarding him various items of personal property that he claimed were not marital assets. The husband also argued that the

trial court abused its discretion by ordering him to pay to the wife 50% of the proceeds he obtained from the sale of real estate located at 415 N. West Street, Lebanon, Indiana. Specifically, the husband contended that the trial court "double dipped" because it found that the husband had used the proceeds of the sale for business expenses. Finding that the business expenses that accrued for Alexander and Associates after the sale of this real estate were the husband's expenses, and that the husband's use of the entirety of the proceeds from the sale of marital property was borrowing from the wife, the Court of Appeals affirmed the trial court's order that the husband pay the wife one-half of the proceeds from the sale of that real estate. The Court of Appeals also rejected the husband's argument that the trial court erred by imposing certain liabilities on him, but not accounting for his assumption of those liabilities in the property distribution. The liabilities related to Alexander and Associates and were incorporated in the valuation of that asset, and liabilities accrued after the date of filing were not marital liabilities. The Court of Appeals also rejected the husband's contention that the trial court deviated from an equal division of marital property, finding that an equal property division was effectuated (given the rejection of the husband's appellate issues). The wife cross-appealed, claiming that there was certain personal property that was not accounted for in the decree. The Court of Appeals remanded for the trial court to award this personal property in accordance with Indiana law. The Court of Appeals rejected the wife's claim of error in valuing and distributing certain annuities.

9. *Bernel v. Bernel*, 930 N.E.2d 673 (Ind. Ct. App. 2010). The parties entered a settlement agreement that the trial court approved on April 1, 2008. The agreement included provisions that the wife would receive $950,000.00 in marketable securities from a J.P. Morgan private bank account, and that all documents necessary to effectuate the transfer would be completed within 60 days of the entry of decree. When the wife attempted to transfer the securities she was awarded, her requests were denied and she was told that no such transfer was possible because the account secured a line of credit. The husband knew about the line of credit at the date of the settlement agreement, but believed he could collateralize the line of credit using another J.P. Morgan private bank account. The husband had the means to pay off the line of credit which would have allowed for the transfer, but did not do so. The wife filed a motion to enforce the settlement agreement and request for injunctive relief. During a hearing on May 6, 2009, the trial court heard evidence that, as a result of a decline in the stock market, securities that had been worth $1,029,051.87 at the date of the decree were only worth $736,540.31 on March 31, 2009. As a result, the funds in the account were insufficient to satisfy the $950,000.00 awarded to the wife. The trial court denied the wife's motion to enforce the settlement agreement and held, in effect, that the $950,000.00 award was unenforceable for the time-being. The Indiana Court of Appeals affirmed in part, reversed in part, and remanded. The Court of Appeals first determined that neither the evidence nor the finding supported the trial court's conclusions that the husband was not untimely and that he had not failed to hold the wife harmless from the line of credit. Finding that the settlement agreement was ambiguous on the valuation date, the Court of Appeals cited prior appellate authority in determining that each party to a dissolution settlement agreement shares in the rewards of growth and the risk of loss associated with an investment plan that is a marital asset. *See Case v. Case*, 794 N.E.2d 514 (Ind. Ct. App. 2003) (*citing Niccum v. Niccum*, 734 N.E.2d 637 (Ind. Ct. App. 2000)). However, in this instance the wife received a fixed sum of $950,000.00 that was unaffected by market forces. The Court of

Appeals reversed and remanded with instructions that the dissolution court enter a money judgment in favor of the wife in the amount of $950,000.00 against the husband, and that the wife could execute and commence proceedings supplemental under Ind. Trial Rule 69 to collect the balance of the debt if the J.P. Morgan private bank account had insufficient funds to satisfy the $950,000.00 judgment. The Court of Appeals further determined that the wife should be awarded prejudgment interest at the statutory rate from the date of the husband's breach, effectively 60 days after entry of the decree. The Court of Appeals also instructed the trial court to determine a reasonable amount of attorneys' fees to which the wife is entitled for payment from the husband.

B. PROCEDURAL ISSUES

1. *Clark v. State*, 915 N.E.2d 126 (Ind. 2009). In this important evidentiary case, the Indiana Supreme Court concluded that the trial court properly admitted the evidence of the defendant's MySpace page because it contained only statements and references to the defendant.

2. *Runkle v. Runkle*, 916 N.E.2d 184 (Ind. Ct. App. 2009), *trans. denied* 929 N.E.2d 785 (Ind. 2010). On August 12, 2002, Susan filed a petition for dissolution of marriage. On May 13, 2003, Max filed his financial declaration which identified a first and second mortgage held by Fifth Third Bank on the marital residence. At some point, Susan contacted Fifth Third Bank and discovered that the signature on the second mortgage did not match the signature on her Fifth Third Bank signature card. On June 18, 2004, the Indiana Court of Appeals entered a decree that ordered, in part, that Max was liable for the entire amount of the $18,740.00 second mortgage. On June 3, 2005, Susan filed a complaint against Max, Fifth Third Bank, and the Fifth Third Bank employee under various theories. Following motions to dismiss, the trial court, on February 17, 2009, granted Max's motion to dismiss because Susan's claim was barred by the doctrine of collateral estoppel/issue preclusion. The trial court later granted Fifth Third Bank summary judgment. The Indiana Court of Appeals reversed the grant of summary judgment in favor of Max, finding that Susan did not agree to forfeit her forgery claim against Max in the decree and that the trial court had written in the decree that Susan's assertions regarding the second mortgage were more appropriately a subject matter of other proceedings. The Court of Appeals affirmed the grant of summary judgment in favor of Fifth Third Bank.

3. *K.S. v. Marion County Dept. of Child Services*, 917 N.E.2d 158 (Ind. Ct. App. 2009). Taking the opportunity to interpret Marion Circuit and Superior Court Civil Rule L.R. 49-TR3.1-201 regarding withdrawals of appearances, the Indiana Court of Appeals reversed the trial court's discretionary grant of the mother's attorney's oral motion to withdraw her appearance at the commencement of a hearing as violative of the local rule. Counsel did not comply with the local rule. Judge Kirsch dissented, finding that the mother's lack of response to her counsel belied her claims of prejudice by the granting of the withdrawal.

4. *Reeder v. Reeder*, 917 N.E.2d 1231 (Ind. Ct. App. 2009). This opinion addresses attorneys' fee awards. On November 21, 2007, the trial court issued an order acknowledging the parties' divorce and determining an issue related to payment of $245,000.00 to the wife's counsel.

Payments were to be made to the wife's lawyers directly. On December 28, 2007, the wife's lawyers filed their attorneys' lien. The parties then submitted an amended decree which was approved on March 10, 2008. The wife subsequently sought to litigate the reasonableness of the attorneys' fees she was charged. The trial court declined the request and found that the wife's lawyers were to be paid. The Indiana Court of Appeals affirmed, in the process declining the wife's request for a jury trial.

5. *McClure & O'Farrell, P.C. v. Grigsby*, 918 N.E.2d 335 (Ind. Ct. App. 2009). On April 26, 2007, the wife filed a petition for dissolution of marriage. On July 27, 2007, the husband died. The husband had paid $3,500.00 in retainers to the law firm. The wife requested an accounting, but the law firm declined on a confidentiality basis without a court order. The wife filed a request for an accounting in the divorce court, which granted the wife's petition. The wife made two requests for attorneys' fees, asking for a total amount of $3,157.50. On March 2, 2009, the trial court summarily granted the wife's request. The Indiana Court of Appeals reversed, finding that the law firm was reasonable in its opposition to the wife's petition and reversed the award of attorneys' fees.

6. *Z.S. v. J.F.*, 918 N.E.2d 638 (Ind. Ct. App. 2009). On January 13, 2009, the father filed a petition for custody which was not served on the mother. Pursuant to an agreement of the parties, the trial court entered a preliminary order in the paternity action on February 27, 2009 and set the final hearing on March 17, 2009. The mother appeared at the final hearing with the Hamilton County Prosecutor appearing on the sole issue of child support. On March 18, 2009, the trial court entered a paternity judgment. On March 25, 2009, the mother filed a motion for relief from judgment pursuant to Ind. Trial Rule 60, alleging surprise that custody and parenting time were in issue on March 17, 2009. On June 12, 2009, the trial court granted the mother relief from judgment. The Indiana Court of Appeals affirmed, finding that the mother was not served with the custody petition. The Court of Appeals noted the strong policy considerations where child custody is at issue, and recognized the lack of a fully-disclosed written and executed settlement agreement and lack of evidence regarding the child's best interests in affirming the grant of relief from judgment.

7. *A.S. v. T.H.*, 920 N.E.2d 803 (Ind. Ct. App. 2010). In another opinion involving an order of protection, the Indiana Court of Appeals affirmed the trial court's order of protection and reiterated that a petitioner must establish by a preponderance of the evidence at least one of the allegations contained in the petition for order of protection. *See also Tisdial v. Young*, 925 N.E.2d 785 (Ind. Ct. App. 2010).

8. *Harris v. Harris*, 922 N.E.2d 626 (Ind. Ct. App. 2010). The husband had been in the United States Military since approximately 1990. The parties were married in December 1995 in New York, and had one child born of the marriage. In late-December 2005, the wife physically separated from the husband and moved to Indiana. On September 12, 2008, the wife filed a petition for dissolution in Marion County, Indiana. In her petition, the wife stated that the husband was stationed in Germany. On October 3, 2008, the husband sent a notice to the trial court indicating that he declined to accept voluntary service. On October 20, 2008, the husband

filed a complaint for absolute divorce in North Carolina. On December 1, 2008, the husband filed a claim for child custody and attorneys' fees in North Carolina. Following a conference between the trial court and the North Carolina trial court pursuant to the Uniform Child Custody Jurisdiction Act, the courts concluded that all issues would be heard in Indiana. The final hearing was scheduled for December 30, 2008, and ultimately occurred on February 2, 2009, at which the wife was present and the husband did not appear. The trial court noted that it agreed to take jurisdiction over the children's issues and the divorce, but that anything else would need to be addressed in North Carolina. The trial court dissolved the parties' marriage, awarded the wife custody of the parties' child, and ordered the husband to pay $239.00 per week as child support, $500.00 per month to the wife as spousal maintenance, delinquent automobile payments in the approximate amount of $1,050.00, the balance owed on the automobile of $14,216.70, and 32% of the husband's military retirement. On March 2, 2009, the husband filed a motion to correct errors. The trial court denied the motion, and the husband appealed. The Indiana Court of Appeals reversed on the issue of whether the husband failed to properly preserve his claim that the trial court lacked personal jurisdiction. Noting that a judgment made when personal jurisdiction is lacking is void and may be collaterally attacked at anytime, the husband preserved this error. Similarly, the trial court's order as to child support, spousal maintenance, payment for and transfer of title to the parties' vehicle, the husband's military retirement, and any other incidences of marriage was void for lack of personal jurisdiction. The Court of Appeals carefully traced Ind. Trial Rule 4.4(a)(7) and appellate authorities. The Court of Appeals concluded, however, that the trial court did have *in rem* jurisdiction to dissolve the parties' marriage, as the wife was a resident of Marion County, Indiana. As to custody, while the trial court may adjudicate custody without a client acquiring personal jurisdiction over an absent parent given reasonable attempts to furnish notice of the proceedings, the Service Members Civil Relief Act (50 U.S.C. §§ 501-596) were not complied with in this case. The Court of Appeals remanded with instructions to comply with the Services Members Civil Relief Act and to make a decision on jurisdiction in accordance with the requirements of the Uniform Child Custody Jurisdiction and Enforcement Act (Ind. Code §§ 31-21-1-1 *et seq.*).

9. *In re A.B.*, 922 N.E.2d 740 (Ind. Ct. App. 2010). The mother had three children. In April 2007, the mother contacted the Lake County Office of the Indiana Department of Child Services ("Department") to request that it take custody of her children. The Department took the children into custody and a detention hearing was held the same day. At the conclusion of the detention hearing, the trial court issued an order authorizing the children's removal and finding probable cause to believe that the children were CHINS. In June 2007, the mother admitted to several of the allegations contained in the CHINS petitions. The mother initially complied with the trial court's orders, but failed to consistently visit the children, maintain stable housing, or have employment. Following a series of events, in February 2009, the Department sought the involuntary termination of the mother's parental rights. The mother initially failed to appear for the termination hearing on July 7, 2009. The hearing was set to commence at 8:30 a.m., but did not actually get underway until 9:44 a.m. The mother's counsel, however, sought to continue the hearing. That oral motion was denied and the mother's attorney subsequently withdrew. The hearing then proceeded and the mother's parental rights were terminated. In reversing, the Indiana Court of Appeals found that the mother eventually appeared at the courthouse at 10:05

a.m. before the conclusion of the termination hearing. Despite notice to the trial court that she was present, the mother was prohibited from entering the courtroom and participating in the remainder of the termination hearing. The Court of Appeals reversed, but cautioned that this case presented very unusual facts, and that the opinion should not be broadly extended to other cases and circumstances.

10. *In re the Paternity of N.L.P.*, 926 N.E.2d 20 (Ind. 2010). The Indiana Supreme Court concluded that when parties in a domestic relations dispute sign a written agreement retaining the services of a Guardian *Ad Litem*, the trial court is bound to enforce the terms of the agreement related to attorneys' fees and litigation expenses incurred by the Guardian *Ad Litem* unless it is contrary to public policy. The Indiana Supreme Court found that trial court's and Indiana Court of Appeals' focus on the reasonableness of the requested Guardian *Ad Litem* fees was misplaced, since the parties separately entered into written agreements with the Guardian *Ad Litem* that set forth hourly rates. Emphasizing the very strong presumption of the enforceability of freely-bargained contracts, the Supreme Court enforced the contract in issue. *In dicta*, however, the Supreme Court noted that trial courts may refuse to enforce private agreements on public policy grounds (*e.g.*, agreements that contravene a statute, agreements that clearly tend to injure the public in some way, and agreements that are otherwise contrary to the declared public policy of the state of Indiana). Justice Boehm dissented in part, reasoning that, like any attorneys' fee agreement, an agreement of a Guardian *Ad Litem* is subject to the reasonableness requirement imposed by professional obligations. Justice Boehm would have affirmed the trial court's order.

C. CHILD SUPPORT

1. *In re M.W.*, 913 N.E.2d 784 (Ind. Ct. App. 2009). On April 4, 2009, 15 year-old M.W. was arrested and charged with a felony. M.W. was living with a foster parent at the time of arrest. On April 6, 2009, M.W. appeared in the trial court for an initial hearing with the Indiana Department of Child Services' ("DCS") case manager and her foster mother. The DCS family case manager admitted to being responsible for M.W., and recommended detention. The trial court committed M.W. to the Muncie Diagnostic and Reception Center. The trial court's order to transport and order on initial hearing included a handwritten annotation that the "Marion Co. DCS to pay all costs." On April 13, 2009, M.W. again appeared before the trial court and admitted to the charges. The DCS appealed, and the Indiana Court of Appeals reversed. Noting Ind. Code §§ 31-34-4-7 and 34-14-19-6.1, the Court of Appeals declared that if a trial court disregards the DCS's recommendations and orders services or placements other than those recommended by DCS, a county's fiscal body may become responsible for funding any and all services ordered by the trial court in that manner. With respect to the payment of costs for the secure detention of a minor delinquent, the new statutory provisions contained in Ind. Code § 31-40-1-2 do not obligate the DCS to pay the costs of detention unless there is a written agreement. As a result, the DCS is not responsible to carry the costs of a minor child's secure detention unless there is a written agreement. In this case, there was no written agreement and the DCS could not be mandated to pay the costs of M.W.'s secure detention. Likewise, the Court of Appeals rejected the trial court's finding that the DCS acted *in loco parentis*. As explained by the Indiana Supreme Court in *In re Marriage of Snow v. England,* 862 N.E.2d 664 (Ind. 2007), *in*

loco parentis status alone is an insufficient basis for imposing a child support obligation on a stand-in parent.

2. *In re Paternity of S.G.H.*, 913 N.E.2d 1265 (Ind. Ct. App. 2009). The parties had a daughter, with paternity established in November 1997. The father was initially ordered to pay $98.00 per week in child support. That obligation was modified to $70.00 per week, effective January 27, 1999. On September 22, 2007, the mother filed a petition to modify child support. The trial court modified the father's child support obligation to $131.00 per week, and required the father to report any bonus received from his employer to the trial court within 15 days of receipt. The trial court added that it would recalculate support at that time, based upon the bonus, and would identify the amount to be paid to the mother as a result of the bonus. Several motions arose from this order, and the trial court, on January 15, 2009, ordered that the bonus payments would require a differential payment to be made if such payment would result in a 20% change in the amount of the father's child support obligation. The trial court order also provided that the father's child support obligation would be abated for his summer parenting time pursuant to the Indiana Parenting Time Guidelines. The mother appealed, and the Indiana Court of Appeals reversed. As to the abatement of child support during the father's summer parenting time, the Court of Appeals found that the trial court erred by including that abatement *and* a parenting time credit based upon 110 overnights in the child support calculation. As to the bonus, the mother argued that the trial court erred by effectively excluding the father's semi-annual "windfall" bonuses under the total income approach taken by the Indiana Child Support Guidelines. The Court of Appeals agreed with the mother that the application of the 20% change in income standard that applies to the modification of a child support order was improper, and remanded to the trial court to calculate the appropriate amount of additional child support due as a result of the "windfall" bonus. The Court of Appeals further suggested that the application of one the methods for calculating bonus income suggested in the Indiana Child Support Guidelines might be helpful. Chief Judge Baker dissented in part as to the inclusion regarding the semi-annual "windfall" bonuses. The dissent suggested that the trial court correctly dealt with the "windfall" bonuses by foregoing the inclusion of those amounts in the calculation of the father's child support obligation, and applauded the trial court for following the Indiana Child Support Guidelines recommendation that trial courts attempt to be innovative when possible.

3. *Hamilton v. Hamilton,* 914 N.E.2d 747 (Ind. 2009). The father and the mother were divorced in Florida in July 2005. The Florida divorce judgment awarded the mother physical custody of the couple's two children, and ordered the father to pay child support in the amount of $1,473.00 per month. The judgment also required the husband to pay a $3,619.00 child support arrearage. The father did not fulfill his child support responsibilities, and by January 2006 owed $11,879.00 in child support. The mother sought enforcement of the father's child support obligation by filing a contempt petition in the Florida trial court. The father did not appear and, on January 13, 2006, the Florida trial court held the father in contempt and sentenced him to 170 days in jail unless he tendered $7,500.00 within 20 days. The Florida trial court also established a payment schedule for the father to satisfy the balance of his arrearages and the ongoing child support obligation. The mother and the children remained Florida residents, but the father moved to Evansville, Indiana. The mother sought enforcement of the Florida trial court orders

by registering the Florida child support judgment and contempt order in the Indiana trial court. The Indiana trial court ruled that the child support judgment was a properly registered foreign order, entitled to full faith and credit. The Indiana trial court also extended full faith and credit to the findings and conclusions in the Florida contempt order, except as to the 170 days jail time. Although the Indiana trial court found the father in contempt, it stayed the jail sentence if the father were to tender $3,750.00 and make monthly payments of $1,250.00. In a separate order entered on November 10, 2006, the Indiana trial court established the father's arrearages at $20,466.50. The father struggled to meet his monthly child support obligations, and the mother soon sought relief through a writ of bodily attachment. On March 29, 2007, the Indiana trial court ordered the father to serve 170 days in the Vanderburgh County Jail, but stayed the sentence contingent upon the father paying the mother $1,000.00, obtaining full-time employment, and executing a wage assignment in an amount the greater of that specified by the Indiana Child Support Guidelines or $150.00 per week. In May 2007, the mother again sought to have the father held in contempt for failure to meet the conditions of the Indiana trial court's orders. In November 2007, the mother again asked the Indiana trial court to find the father in contempt and to order larger monthly payments and more aggressive enforcement of the Florida child support order. On March 4, 2008, the Indiana trial court ruled that the father was not in contempt. The Indiana trial court explained that the Federal Consumer Credit Protection Act ("FCCPA") had limits on withholding of aggregate disposable weekly earnings, and that the father was paying in excess of the maximum 60% share under that statute. The mother appealed, arguing that the Indiana trial court (1) order constituted an impermissible modification of the Florida child support judgment, (2) erred in finding that the FCCPA capped a father's child support obligations, and (3) abused its discretion in failing to hold the father in contempt. The Indiana Supreme Court ultimately reversed. In response to the question as to whether the Indiana trial court's March 4, 2007, order constituted a modification of the original Florida child support order in violation of the Full Faith and Credit Clause or the Supremacy Clause of the United State Constitution, the Supreme Court indicated that the stated objective of the Uniform Interstate Family Support Act ("UIFSA") and the Full Faith and Credit for Child Support Orders Act ("FFCCSOA") is to create a national regime in which only a single support order is effective at any given time. Noting that other jurisdictions had found the FFCCSOA and UIFSA to be "virtually identical", the Supreme Court cited foreign precedent concluding that, where UIFSA is silent, the FFCCSOA may help fill in any gaps. The Supreme Court also noted that it had recently ruled in *Basileh v. Alghusain*, 912 N.E.2d 814 (Ind. 2009) that the FFCCSOA does not preempt UIFSA. The Supreme Court reasoned that the Indiana trial court's order was consistent with UIFSA and met the requirements of the Federal Constitution. Accordingly, the trial court's contempt orders did not modify the Florida support judgment in violation of UIFSA or the FFCCSOA, and are consistent with the requirements of the Full Faith and Credit Clause of the United State Constitution. As to the contempt finding, the Supreme Court remanded, based on the observation that, to the extent the Indiana trial court's ruling was based on the FCCPA garnishment limitations, it was predicated on an erroneous view of the law. The garnishment limitations imposed under the FCCPA did not affect the ability of the Indiana trial court to find the father in contempt.

4. *Vandenburgh v. Vandenburgh*, 916 N.E.2d 723 (Ind. Ct. App. 2009). The parties had three children and were divorced in 2003. At the time of the modification hearing, their daughter was 21 and a senior at Indiana University, one son was a senior in college and the other was a senior in high school. On June 30, 2008, the trial court modified child support, determined the father owed the mother $2,500.00 in attorneys' fees, and found the father in contempt. The Indiana Court of Appeals affirmed and remanded, dispensing with the father's argument that he was wrongfully denied a parenting time credit as to their high school-aged son. The son testified that he stayed overnight with the father Mondays and Thursdays each week, and approximately 20 additional overnights per year. The Indiana Court of Appeals noted that, under Indiana Child Support Guideline 3(G)(4), trial courts have discretion as to granting a parenting time credit, and that the use of the word *may* made the credit discretionary. The Court of Appeals found that the trial court correctly considered evidence that the overnights did not alter the financial burden of the custodial and non-custodial parent since the mother paid for the son's clothing, medical care, and contributed to the purchase of his car. The Court of Appeals also affirmed the trial court's order giving the mother a credit for health insurance premium payments, but remanded due to the lack of signatures on the Child Support Obligation Worksheet attached to the trial court's order (the trial court's findings did not explain its worksheet.) The Court of Appeals affirmed the trial court's finding the father in contempt because he unilaterally modified his child support obligation while waiting for an order to be issued by the trial court. The Court of Appeals also remanded to the trial court to determine whether the mother's direct deposits into their college-aged son's Purdue University account was a gift or payment of college expenses. The Court of Appeals affirmed the $2,500.00 award of attorneys' fees to the mother.

5. *Hicks v. Smith*, 919 N.E.2d 1169 (Ind. Ct. App. 2010). The issue on appeal was whether the trial court abused its discretion in awarding a judgment to the mother. The father did not pay child support of $47.00 weekly, as required by the trial court's March 20, 1992, order. On April 30, 1993, the trial court found the father in contempt and entered an arrearage in attorneys' fees judgment in the total amount of $3,029.00. On December 8, 1994 that order was amended to reflect a further arrearage of $4,418.00, resulting in a total judgment of $7,447.00. The father was charged with a crime for absconding with the parties' son. He remained a fugitive until appearing in court on August 21, 2008, to answer criminal charges. The mother sought proceedings supplemental, and the trial court ordered the father to pay interest on the $7,447.00 judgment, and be responsible for additional arrearage, resulting in a judgment of $27,965.00, plus interests. In a 2-1 decision, the Indiana Court of Appeals found that the trial court acted within its discretion in awarding a judgment on the arrearage to the mother. Judge Darden dissented, finding the order to be inequitable based on the circumstances since the father (even though acting criminally) fed, clothed, sheltered, and cared for the parties' son for all the years they were missing. Judge Darden found the order to be an unwarranted windfall for the mother, and would have remanded for the trial court to hear evidence of actual expenses and/or expenditures the mother incurred on the son's behalf during the relevant time, and to further consider the father's argument that past-due child support should be deposited into a trust for the benefit of the son.

6. *Boone v. Boone*, 924 N.E.2d 649 (Ind. Ct. App. 2010). The parties had one child born out-of-wedlock in 1998. In 2006, the father filed a petition for dissolution of marriage in Illinois. Following a dismissal for lack of jurisdiction, the father filed a divorce action in Indiana on November 7, 2007. At the November 20, 2008, final hearing, the mother requested that the trial court impose a support obligation on the father retroactive to June 1, 2006, which was the approximate date she alleged that the father stopped sending voluntary bi-weekly support payments. In the dissolution decree, the trial court granted the request and ordered a $14,574.42 arrearage. The father filed a motion to correct error, which the trial court denied. The Indiana Court of Appeals reversed, finding that parents have a common law duty to support their children and that the trial court did not have the authority to reach into an intact marriage to order traditional child support. Judge Najam dissented, finding that Ind. Code § 31-16-2-2 codifies the common law duty of a parent to support a child and created an unlimited cause of action. He also found the common law duty of support transcends the concept of an "intact" marriage a concept that is not defined under Indiana law.

7. *Culbertson v. State*, 929 N.E.2d 900 (Ind. Ct. App. 2010). This opinion recognizes that the non-support of a dependent child is a Class C Felony under Ind. Code § 35-46-1-5. The Indiana Court of Appeals rejected the defendant's claim that his incarceration established his inability to pay child support, affirmed the trial court's discretionary rejection of the defendant's request to proportionally reduce the amount of child support owed as each child of his became emancipated, and rejected the defendant's claim that he was entitled to a retroactive modification of child support when the defendant did not file a modification petition.

D. SPOUSAL MAINTENANCE

1. There were no reported spousal maintenance cases in this term.

E. CUSTODY/PARENTING TIME

1. *A.J.L. v. D.A.L.*, 912 N.E.2d 866 (Ind. Ct. App. 2009). The mother and the father had three children, two of whom were born out-of-wedlock. The father's aunt and uncle regularly assisted in providing childcare to the children. On January 5, 2006, the father filed a *pro se* petition for dissolution of marriage. The children lived with the aunt and uncle 50% of the time from January 2006 through February 2007, and 60% to 70% of the time from February 2007 to February 2008. During those periods, the aunt and the uncle provided the children with food, clothes, and medical care, and attended to their educational needs. On May 9, 2008, the aunt and the uncle petitioned for emergency custody. On May 13, 2008, the mother filed a motion for specific parenting time. On June 24, 2008, the trial court appointed a Court-Appointed Special Advocate. On December 12, 2008, the trial court entered its decree of dissolution of marriage, which found, in part, that the aunt and the uncle were *de facto* custodians of the children pursuant to Ind. Code § 31-9-2-35.5. Turning to Ind. Code § 31-17-2-8.5 and the factors embodied in that provision, the trial court awarded the aunt and the uncle custody of the children. The mother appealed, and the Indiana Court of Appeals affirmed. The Court of Appeals determined that the aunt and the uncle provided clear and convincing evidence of their *de facto*

custodian status, and found evidence to be sufficient to support the award of custody to the aunt and the uncle pursuant to Ind. Code § 31-17-2-8.

2. *Oberlander v. Handy*, 913 N.E.2d 734 (Ind. Ct. App. 2009). Anita and Kevin began dating in March 2005, and Anita gave birth to the parties' daughter, A.H., on March 14, 2006. Anita and Kevin were married in December 2006, and Anita filed a petition to dissolve the marriage and sought a protective order on March 22, 2007. The parties' relationship was tumultuous and frequently violent. On March 22, 2007, a protective order was entered that prohibited Kevin from contacting or approaching Anita, A.H., or Anita's three children from a prior marriage. On April 1, 2007, Anita and the children discovered Kevin hiding in their home. Anita deployed a stun gun, but Kevin disarmed and used the stun gun against her. Kevin fled before the police arrived, and was involved in a high-speed chase the next day that resulted in a crash and Kevin being airlifted to a hospital. Kevin faced criminal charges but, after being discharged from the hospital, allegedly continued to drive past Anita's residence and telephoned Anita repeatedly. On July 24, 2007, the parties agreed that Kevin could have restricted parenting time if he continued in counseling and took his medication, and the protective order was modified accordingly. In August 2007, Kevin's parenting time with his daughter from a prior marriage was halted because of his behavior. In September 2007, Kevin returned to the marital home against Anita's wishes, but was not in violation of the modified protective order. Kevin continued contacting Anita throughout 2007 and 2008. On April 1, 2008, the trial court set a final divorce hearing for July 22, 2008. Anita's attorney had withdrawn, and she unsuccessfully attempted to find an attorney through legal aid. Anita had moved by this point, and was unable to attend the final hearing due to lack of financial resources and her living outside of Indiana. The trial court proceeded in her absence and ruled in Kevin's favor, awarding him full custody of A.H. and all marital property except for the vehicle driven by Anita. On August 21, 2008, Anita filed a request for relief from judgment because of fraud. The trial court requested that the Indiana Department of Child Services ("DCS") investigate the situation and prepare a report with a recommendation as to the best interests of A.H. On January 2, 2009, the trial court denied Anita's motion. The Indiana Court of Appeals affirmed and remanded. In its analysis, the Court of Appeals noted that Anita sought relief from judgment under Ind. Trial Rule 60(B), even though she later argued that it was really an Ind. Trial Rule 59 motion to correct error. The Court of Appeals concluded that Anita was not entitled to relief via either of those procedural vehicles, and focused on Anita's failure to appear at the final hearing. Having said that, the Court of Appeals invited a modification petition and noted that the DCS's uncontroverted recommendation was that Anita be given custody of A.H. The Court of Appeals urged the trial court to look at the factors set forth in Ind. Code § 31-17-2-8 and apply those factors explicitly in its final custody order, and remanded to the trial court to revisit the case and weigh *all* of the evidence to determine whether a modification of the current custody arrangement was warranted. Judge Riley dissented, stating that she would have granted the mother's motion to correct error and remanded for a new final hearing. The dissent viewed the majority opinion as trying to please everyone by, on the one hand, affirming the trial court's order, while, on the other hand, directing the trial court to reconsider its custody determination in line with Anita's request.

3. *D.B. v. M.B.V.*, 913 N.E.2d 1271 (Ind. Ct. App. 2009). The parties were married on July 24, 1982, and divorced on April 7, 2005. The trial court adjudicated custodial issues related to the parties' two unemancipated children. Dr. John Ehrmann performed a custody evaluation and recommended that the mother have physical custody of the children, but expressed concerns that the mother sought to redress the father's marital infidelity by alienating the children from him, and viewed him only as a provider. The parties agreed that the mother would have physical custody of the children, with the parenting time schedule for the father. The children began therapy with Dr. Richard Grana, and the trial court appointed Bruce Pennamped to serve as the children's Guardian *Ad Litem*. Dr. Grana and Mr. Pennamped issued a joint recommendation to the trial court suggesting structured, monitored visits, and periodic counseling sessions. Dr. Grana and Mr. Pennamped expressed concern about the father's mental health, more specifically, his depression resulting from the extensive family problems. Over the next few years, several mental health professionals provided or attempted to provide services to the family. Nevertheless, the interaction between the father and the children deteriorated rather than improved. The father subsequently petitioned the court for midweek parenting time and a finding of contempt against the mother. The new Guardian *Ad Litem*, Anne Fierek, recommended that the father have no parenting time with the children. The trial court followed that recommendation, ordered no contact by the father with the mother and the children, and ordered the father to pay $14,000.00 of the mother's attorneys' fees. The Indiana Court of Appeals reversed in part, suggesting supervised parenting time rather than a complete termination of parenting time. The Court of Appeals noted that the trial court articulated no specific findings that parenting time would cause harm to the children. Accordingly, the Court of Appeals remanded with encouragement that the parenting time be supervised. The Court of Appeals affirmed the attorneys' fee award to the mother.

4. *In re Guardianship of S.M.*, 918 N.E.2d 746 (Ind. Ct. App. 2009). In a concise analysis of subject matter jurisdiction, the Indiana Court of Appeals concluded that the trial court lacked subject matter jurisdiction, and its orders were void *ab initio*. The opinion focuses on the Indiana codification of the Uniform Child Custody Jurisdiction Law. An Illinois trial court made a child custody determination in 2002 and modified its order in 2007. Focusing on Ind. Code § 31-21-5-3, the Court of Appeals opined that the statutory requisites to modify the Illinois order were not met. The Court of Appeals also concluded that the trial court lacked subject matter jurisdiction to establish a guardianship absent a showing of abandonment or the threat of mistreatment or abuse as noted in Ind. Code § 31-21-5-4.

5. *Henderson v. Henderson*, 919 N.E.2d 1207 (Ind. Ct. App. 2010). On April 27, 2009, the trial court entered a provisional order granting the parents joint legal custody of their two children, with the wife designated as primary physical custodian. On May 8, 2009, the husband filed verified petitions for contempt alleging parenting time violations by the wife. The trial court conducted a hearing on the provisional orders immediately before the final hearing, determined both parties to be in contempt, heard a summary of each party's positions as to the final hearing, and ordered the wife's counsel to prepare a decree that tracked the provisional order. The Indiana Court of Appeals reversed the contempt finding against the husband, and found that the husband's state constitutional and statutory rights were violated by the trial court

in failing to hear evidence at the final hearing. Accordingly, the Court of Appeals vacated the decree and remanded for a new final hearing.

6. *In re K.C.*, 922 N.E.2d 738 (Ind. Ct. App. 2010), *trans denied* 929 N.E.2d 796 (Ind.). The mother gave birth to K.C. out-of-wedlock in Indiana and was the custodial parent pursuant to Ind. Code § 31-14-13-1. Absent any adjudication of custody, the father removed K.C. from Indiana to Alabama and later to Mississippi. The mother located the father several years later and filed a petition for *habeas corpus* in Indiana. The father moved to dismiss, claiming that Mississippi had become K.C.'s home state and the proper state in which to adjudicate custody under the Uniform Child Custody Jurisdiction Act. The trial court determined that it lacked jurisdiction to adjudicate K.C.'s custody in deference to Mississippi and refused to issue a writ. The mother appealed, and the Indiana Court of Appeals reversed and remanded. The Court of Appeals reasoned that the mother did not seek to have K.C.'s custody adjudicated, but rather sought to enforce her rights as the legal custodial parent as established under Ind. Code § 31-14-13-1. The Court of Appeals commented that the father's behavior was at worst criminal and at best self-help that ignored relevant law and his unilateral actions could not deprive the Indiana trial court of jurisdiction to enforce custody rights vested in one of its citizens.

7. *R.W.M. v. A.W.M.*, 926 N.E.2d 538 (Ind. Ct. App. 2010). On April 4, 1992, the mother and the father participated in a "Christian coverture marriage" affirmation ceremony, but never obtained a valid marriage license and were not legally married. In 1999, the parties had two children, each born after the ceremony. The parties separated in December 2004, and the mother filed a paternity action. The father filed a separate petition for dissolution of marriage. All cases were consolidated for hearing in the trial court. Following a series of hearings, the trial court issued its final order on January 5, 2009, as to all pending issues. Each party filed a motion to correct error, and on May 1, 2009, the parties filed an Agreed Order setting forth the issues that the parties believed remained pending. The trial court approved and signed the Agreed Order that same day. The father filed his notice of appeal on May 5, 2009. The Indiana Court of Appeals found that the January 5, 2009, order was not final and did not resolve all pending matters. Concluding that the January 5, 2009, judgment was only an interlocutory on child custody and child support that was neither certified as appealable by the trial court nor accepted as such by the Court of Appeals, the Court of Appeals dismissed the appeal without prejudice.

8. *Finnerty v. Clutter*, 917 N.E.2d 154 (Ind. Ct. App. 2009), *trans denied* 929 N.E.2d 784 (Ind. 2010). In November 2007, the father filed a petition to modify child support and parenting time. In March 2009, following a hearing, the trial court ruled that the father was entitled to parenting time on alternate weekends from Friday at 4:00 p.m. to Sunday at 7:00 p.m. and on Tuesdays and Thursdays from 4:00 p.m. to 7:00 p.m., along with summer and holidays, pursuant to the Indiana Parenting Time Guidelines. The trial court's order also provided that church attendance on the father's weekend would be his prerogative, although the trial court recommended that the children attend church with the father if that had been their practice in the past to do so. The issue presented was whether the trial court erred by failing to adjust the father's parenting time so that the mother could take children to church. The mother contended that she, as custodial parent, was entitled to make decisions regarding religious training pursuant

to Ind. Code § 31-17-2-17(a). The father pointed out that the parties shared joint legal custody. As the parents shared legal custody, the Indiana Court of Appeals affirmed the trial court's ruling as within its discretion.

9. *In re Paternity of T.P.*, 920 N.E.2d 726 (Ind. Ct. App. 2010), *trans denied* 929 N.E.2d 790 (Ind.). T.P. was born to the mother and the father on September 1, 2001. On June 17, 2004, the mother and the father asked the caretakers to care for T.P. temporarily until the mother, who was homeless, could better provide for T.P. The caretakers agreed. On August 9, 2004, the mother reported T.P. missing. The authorities found T.P. at the caretakers' home. The caretakers showed authorities a notarized statement indicating the mother's and the father's consent that they care for T.P. On August 10, 2004, the Marion County Office of Family and Children ("OFC") initiated CHINS proceedings. On August 11, 2004, the trial court concluded that T.P. was a CHINS and ordered her placed with the caretakers. The mother and the father were granted supervised parenting time. The permanency plan for T.P. was for reunification with her parents. On October 25, 2004, the mother filed a paternity action against the father. On November 8, 2004, the trial court established the father's paternity, granted him parenting time, and ordered him to pay child support. At some point, the caretakers went on vacation and left T.P. with someone who was not a certified foster care worker, causing the authorities to remove T.P. from the caretakers' care. On October 26, 2005, OFC requested closure of the CHINS proceedings and T.P. was placed in the mother's care. The caretakers continued to have a role in T.P.'s life and cared for her many days of the month with the mother's permission. The caretakers also provided the mother and T.P. with food and money. During May 2007 to September 10, 2008, the caretakers cared for T.P. for a total of 244 days. The mother admitted to having used drugs, including crack, in Summer 2008. On August 24, 2008, the mother and her brother were involved in a physical altercation and arrested. T.P. had difficulties with school. On September 10, 2008, the caretakers filed an emergency petition to intervene in the mother's paternity action against the father and sought temporary and permanent modification of custody of T.P. The caretakers contended they were T.P.'s *de facto* custodians since June 17, 2004. On July 24, 2009, the trial court denied the caretakers' petition seeking modification of custody. In doing so, the trial court concluded that the caretakers were not *de facto* custodians. The Indiana Court of Appeals affirmed finding that the caretakers had not cared for T.P. the majority of days during the evaluated time-frame. The Court of Appeals noted the natural parent presumption and found other factors did not overcome that presumption.

10. *Harris v. Harris*, 922 N.E.2d 626 (Ind. Ct. App. 2010). The husband had been in the United States Military since approximately 1990. The parties were married in December 1995 in New York, and had one child born of the marriage. In late-December 2005, the wife physically separated from the husband and moved to Indiana. On September 12, 2008, the wife filed a petition for dissolution in Marion County, Indiana. In her petition, the wife stated that the husband was stationed in Germany. On October 3, 2008, the husband sent a notice to the trial court indicating that he declined to accept voluntary service. On October 20, 2008, the husband filed a complaint for absolute divorce in North Carolina. On December 1, 2008, the husband filed a claim for child custody and attorneys' fees in North Carolina. Following a conference between the trial court and the North Carolina trial court pursuant to the Uniform Child Custody

Jurisdiction Act, the courts concluded that all issues would be heard in Indiana. The final hearing was scheduled for December 30, 2008, and ultimately occurred on February 2, 2009, at which the wife was present and the husband did not appear. The trial court noted that it agreed to take jurisdiction over the children's issues and the divorce, but that anything else would need to be addressed in North Carolina. The trial court dissolved the parties' marriage, awarded the wife custody of the parties' child, and ordered the husband to pay $239.00 per week as child support, $500.00 per month to the wife as spousal maintenance, delinquent automobile payments in the approximate amount of $1,050.00, the balance owed on the automobile of $14,216.70, and 32% of the husband's military retirement. On March 2, 2009, the husband filed a motion to correct errors. The trial court denied the motion, and the husband appealed. The Indiana Court of Appeals reversed on the issue of whether the husband failed to properly preserve his claim that the trial court lacked personal jurisdiction. Noting that a judgment made when personal jurisdiction is lacking is void may be collaterally attacked at anytime, the husband preserved this error. Similarly, the trial court's order as to child support, spousal maintenance, payment for and transfer of title to the parties' vehicle, the husband's military retirement, and any other incidences of marriage was void for lack of personal jurisdiction. The Court of Appeals carefully traced Ind. Trial Rule 4.4(a)(7) and appellate authorities. The Court of Appeals concluded, however, that the trial court did have *in rem* jurisdiction to dissolve the parties' marriage, as the wife was a resident of Marion County, Indiana. As to custody, while the trial court may adjudicate custody without a client acquiring personal jurisdiction over an absent parent given reasonable attempts to furnish notice of the proceedings, the Service Members Civil Relief Act (50 U.S.C. §§ 501-596) were not complied with in this case. The Court of Appeals remanded with instructions to comply with the Services Members Civil Relief Act and to make a decision on jurisdiction in accordance with the requirements of the Uniform Child Custody Jurisdiction and Enforcement Action (Ind. Code §§ 31-21-1-1 *et seq.*).

11. *In re Paternity of L.J.S.*, 923 N.E.2d 458 (Ind. Ct. App. 2010). On January 3, 2006, the mother gave birth to L.J.S. At the time, the mother lived with her parents. On September 8, 2006, the mother filed a petition to establish paternity and for child support. That same day, the parents entered into an agreed judgment of paternity that granted the mother custody of L.J.S. and the father parenting time. The parties lived with the maternal grandparents for the first 15 months of L.J.S.'s life. In April 2007, the mother and L.J.S. moved out of her parents' home to live with the mother's new boyfriend. The mother and her parents agreed that L.J.S. would continue to stay at her parents' home 3 nights a week. This arrangement continued for 8 months. On January 1, 2008, L.J.S. and the mother moved back to her parents' house, where they lived for the next 6 months. In June 2008, the mother moved to Kentucky, but L.J.S. remained with the mother's parents. The father, during this time period, paid child support and had parenting time with L.J.S. during certain time frames. The mother and the father signed a stipulation giving the father sole legal and physical custody of L.J.S. and, on August 3, 2008, the father picked L.J.S. up from the mother's parents' home. The trial court did not approve the stipulation since it did not provide for the mother's parenting time and child support. The father then returned L.J.S. to the mother's parents. The mother's parents filed petitions on August 13, 2008 requesting that they be named the *de facto* custodians and granted legal custody of L.J.S. The trial court modified custody of L.J.S. from the mother to her parents, and the mother and the

father were granted reasonable parenting time pursuant to the Indiana Parenting Time Guidelines. The Indiana Court of Appeals reversed, finding that the presumption in favor of natural parents had not been rebutted by the mother's parents by clear and convincing evidence.

12. *Julie C. v. Andrew C.*, 924 N.E.2d 1249 (Ind. Ct. App. 2010). Julie and Andrew had two children. The parties' divorce decree provided that they would share joint legal custody of their children, with Julie having primary physical custody. In 2008, Andrew filed a petition to modify custody or, in the alternative, parenting time. The trial court granted the Andrew additional overnight parenting time. Julie contended that the trial court abused its discretion by making a *de facto* modification to joint physical custody and declining to modify joint legal custody to Julie having sole custody, and declining to find Andrew in contempt for failing to pay child support. The Indiana Court of Appeals affirmed, finding that, when a subsequent marriage occurs in conjunction with other substantial changes in the factors listed in Ind. Code § 31-17-2-8, they may together constitute a substantial change in circumstances. The Court of Appeals rejected Julie's contention that the new schedule, providing for more transitions for the children, were not in the children's best interests. As to legal custody, the Court of Appeals declined to reweigh the evidence. The Court of Appeals also affirmed the trial court's declining to find Andrew in contempt regarding child support non-payment, the trial court's child support calculation, and the trial court's declining to award Julie partial or full attorneys' fees.

13. *Tew v. Tew*, 924 N.E.2d 1262 (Ind. Ct. App. 2010). The mother and the father were married on August 7, 1982, and had two children. The parties divorced on June 17, 2003, the mother awarded custody of M.T. On May 12, 2005, the father was awarded custody of M.T. The mother later regained custody of M.T. On April 15, 2009, the father filed a petition for emancipation of then-18 year old M.T., because M.T. was emancipated or had repudiated her relationship with the father. The trial court denied the father's petition. The Indiana Court of Appeals affirmed, finding that M.T. continued her educational status and relied upon others for her support. The Court of Appeals also affirmed the trial court's rejection of the father's repudiation argument, finding that M.T. had engaged in group visits with the father and had some contact with him.

14. *Abbott v. Abbott*, 560 U.S. 130 S. Ct. 1983 (2010). In this rare case elevating to the United States Supreme Court, the issue presented was whether a parent has a right of custody by reason of *ne exeat*: The authority to consent before the other parent may take the child to another country. The United States Supreme Court interpreted the Hague Convention on the Civil Aspects of International Child Abduction, as implemented by the United States Congress through the International Child Abduction Remedies Act, and concluded that the father possessed a right of custody under the Hague Convention and that *ne exeat* rights are rights of custody.

15. *Paternity of X.A.S. v. S.K.*, 928 N.E.2d 222 (Ind. Ct. App. 2010). X.A.S. was born on September 14, 1997. On October 12, 1999, the father filed a petition to establish paternity. On January 11, 2000, the trial court granted the petition and also granted the father custody of X.A.S. subject to the mother's parenting time. On August 9, 2008, the father remarried a

member of the United States Navy. The father had filed a notice of intent to relocate prior to his remarriage, requesting permission to relocate with X.A.S. to California. The Marion County Domestic Relations Counseling Bureau filed a report with the trial court on May 1, 2009, recommending the relocation. The trial court conducted an *in camera* interview of X.A.S. and, following a hearing, denied the father's relocation request and granted the mother custody. The Indiana Court of Appeals reversed and instructed the trial court on remand to enter an order granting the father's petition to relocate with X.A.S., denying the mother's request to modify custody, and setting new terms of parenting time and child support if necessary. The Court of Appeals began its analysis by noting that the relocation statute (Ind. Code § 31-17-2.2-1) incorporates modification factors set forth in Ind. Code § 31-17-2-21, but contains other factors to be considered. The Court of Appeals undertook an analysis of all factors, and determined that the trial court's denying the father's request to relocate with X.A.S. and granting the mother's petition to modify custody was clearly erroneous.

16. *Tamasy v. Kovacs*, 929 N.E.2d 820 (Ind. Ct. App. 2010). The mother and the father, parents of three sons, were divorced on August 14, 2000. The parties shared joint legal custody of their children, with the mother having primary physical custody. The mother moved to Massachusetts shortly after the divorce. The father's parenting time included 6 weeks in Indianapolis each summer. On May 7, 2008, the father filed a petition seeking a modification of the prior custody order. Six days later, the mother filed custody proceeding in Massachusetts. The mother subsequently requested that the trial court decline jurisdiction over the father's custody petition because Massachusetts was a more convenient forum. On June 10, 2008, the trial court denied the mother's request and issued an order finding Indiana was the most convenient forum. On June 5, 2009, the trial court modified the prior custody order and granted the father primary physical custody of the parties' three children. The Indiana Court of Appeals affirmed. In its analysis, the Court of Appeals considered Indiana's adaptation of the Uniform Child Custody Jurisdiction Act and found that the father's continuous presence in Indiana provided a "significant connection" between the custody matter and the trial court. As a result, the evaluation of whether Massachusetts would be a more convenient forum was within the trial court's discretion. The Court of Appeals also adopted the trial court's view that the mother was "forum shopping", finding that the mother did not challenge Indiana's jurisdiction until after the father filed his custody modification petition. The Court of Appeals also rejected the mother's contention that the trial court abused its discretion by excluding rebuttal testimony of Dr. Jon Gould. The mother had failed to include Dr. Gould's name on either her pre-trial or final witness list. As to other witnesses, the mother did not sufficiently identify them to warrant error from their testimonial exclusion. The Court of Appeals also found that the trial court properly considered the modification factors and concluded that a custody modification was warranted.

17. *In re Paternity of P.B.*, _____ N.E.2d _____ (Ind. Ct. App. 2010) (No. 03A01-1001-JP-5). This appeal contains multiple issues. On December 11, 2009, the trial court found that paternity of P.B. was established by agreement on November 20, 2001 and entered orders pertaining to custody, parenting time, and child support. On January 9, 2009, the mother filed a petition for contempt regarding parenting time and the father's alleged behaviors. On March 17, 2009, the father filed a petition for contempt related to the mother's alleged interference with and

denial of parenting time. On May 11, 2009, the trial court commenced a hearing on all pending issues. On May 12, 2009, the trial court entered an order finding that the father was current in his child support obligation as of May 11, 2009, and terminating the income withholding order in favor of direct payment. The December 11, 2009, order was favorable to the father and the mother appealed. The Indiana Court of Appeals affirmed in part and reversed in part. The Court of Appeals reversed as to the issue of the mother's attempt to terminate the father's parenting time, finding that the trial court incorrectly used a clear and convincing (rather than preponderance of the evidence) standard. The Court of Appeals affirmed the trial court's decision not to hold the father in contempt, as well as the denial of the mother's request for attorneys' and therapists' fees. The Court of Appeals affirmed the trial court's refusal to modify a Christmas parenting time schedule and order related to an alleged child support arrearage.

F. ADOPTION/PATERNITY

1. *In re Adoption of A.S.,* 912 N.E.2d 840 (Ind. Ct. App. 2009). S.S. was the biological mother of A.S., D.S., C.S., and J.S. The parental rights of A.S.'s father were terminated in 2003. The Marion County Department of Child Services ("DCS") removed the four children from the mother's care and made the children wards of the state because several of them tested positive for cocaine at birth. The children originally were placed with a foster mother and, in February 2006, the foster mother petitioned to adopt the children. DCS consented to the adoption of three of the children, with one of the children not eligible for adoption. Following allegations regarding a relative of the foster mother, DCS removed the children and placed them with V.S. V.S. shared a home with her adult daughter, L.S., and L.S.'s teenage daughter. L.S. filed a petition to adopt three of the children, and V.S. filed a petition to adopt one of the children. Although DCS had signed consents for the foster mother to adopt the children, DCS subsequently consented to the L.S. and V.S. proposed adoptions. Following various testing and assessments, the trial court presided over the adoption proceedings involving the children. The trial court permitted DCS to participate as a party over the foster mother's objection. The trial court issued an order, following briefing, indicating that both the foster mother and the V.S. and L.S. petitions were supported by the necessary parental consents. The trial court then conducted several evidentiary hearings, and issued a final adoption decree granting the V.S. and L.S. petitions to adopt the children. The foster mother appealed, and the Indiana Court of Appeals affirmed. The Court of Appeals first noted that the foster mother did not object to a successor judge in the trial court that entered the adoption decree. (The initial trial judge passed away during the pendency of the case). As to the foster mother's challenge that subsequent consents are not valid unless the prior consents are withdrawn, the Court of Appeals analyzed the Adoption Code (Ind. Code § 31-19-1-1 *et seq.*), and concluded that not all subsequent consents are void under the Adoption Code. The competing consents were as valid as the initial consents. The Court of Appeals also recited the caution that a trial court should not adopt a party's proposed findings *verbatim*, but that that practice was not prohibited. The Court of Appeals found the trial court's adoption decree to be supported by the evidence and not clearly erroneous.

2. *In re Paternity of P.S.S.,* 913 N.E.2d 765 (Ind. Ct. App. 2009). The husband and the wife were married on February 2, 1985, and lived together until separation in May 2000. Four

children were born to the parties during their marriage. On December 6, 2000, the husband filed a petition for dissolution of marriage. On August 23, 2001, the trial court entered an order noting that the rebuttable presumption that the husband was the father of P.S.S. could not be rebutted until there was a Guardian *Ad Litem* appointed for the child. On November 16, 2001, the trial court approved and mediated a marital settlement agreement and entered a decree of dissolution of marriage. The parties agreed to share joint legal custody of three of their four children, but acknowledged that one child was the biological child of a third person who was not a party to the case. On August 11, 2005, the wife filed a petition to modify primary placement. The trial court awarded the wife full legal and physical custody of the children and ordered the husband to pay the wife $130.00 per week in child support. On November 24, 2008, P.S.S., by next friend (the husband), filed a petition to establish paternity against the wife and the putative father in juvenile court. On December 11, 2008, the juvenile court dismissed the cause and found that "exclusive jurisdiction vested with the [trial court] when the Petition for Dissolution of Marriage (or similarly named pleading) was filed on or about December 2000." P.S.S. appealed, and the Indiana Court of Appeals affirmed. The Court of Appeals determined the issue on appeal was the denial of P.S.S.'s motion for relief from judgment under Ind. Trial Rule 60(B) (P.S.S. had moved for relief of judgment after the initial dismissal.) The Court of Appeals first determined that the trial court incorrectly concluded that it did not have jurisdiction, as the trial court's equitable power should have been invoked under Ind. Trial Rule 60(B)(8). Noting that P.S.S. was not a party to the dissolution proceedings, the Court of Appeals acknowledged that the trial court appointed a Guardian *Ad Litem* to protect her interests with respect to the issue of paternity. The Court of Appeals reasoned that P.S.S.'s interests were represented and taken into consideration during the paternity mediation. Accordingly, the Court of Appeals concluded that P.S.S. and the husband had a full and fair opportunity to take part in the resolution of the issue during mediation and that it would be unfair to give P.S.S. and the husband a "second bite at the apple." Judge Riley dissented, agreeing with the majority's stance on the jurisdictional issue, but departing with the majority's treatment of the merits of P.S.S.'s action. The dissent noted that although the issue of P.S.S.'s paternity might have been raised during the divorce proceedings, that was not determinative to vest jurisdiction over the paternity petition with the trial court. Judge Riley concluded that P.S.S., by the husband as next friend, was entitled to bring a paternity action in the juvenile court.

3. *In re Adoption of E.L.*, 913 N.E.2d 1276 (Ind. Ct. App. 2009). E.L. was born to V.N. on June 20, 2004. No father was listed on E.L.'s birth certificate. V.N. and R.J. had a relationship and, based on a "paternity test" taken shortly after E.L.'s birth, believed that R.J. was E.L.'s father. In 2006, R.J. moved to Florida and ceased having regular contact with E.L. V.N. married J.N. on January 29, 2006, and E.L. resided with V.N. and J.N. ever since that date. On May 7, 2007, J.N. filed a petition to adopt E.L. with V.N.'s consent to the adoption attached. V.N. contacted R.J. and requested his consent to the adoption, but R.J. refused. On May 21, 2007, R.J. filed a paternity action. On November 20, 2007, the trial court appointed, in the consolidated paternity and adoption matter, a Guardian *Ad Litem* to represent E.L.'s interests. The Guardian *Ad Litem* filed a report on April 18, 2008, recommending that J.N.'s adoption petition be denied and paternity established in R.J. On April 29, 2008, V.N. orally moved the trial court to dismiss the paternity action on the ground that R.J. was barred by statute from

seeking paternity. On February 18, 2009, the trial court dismissed the paternity action. The Indiana Court of Appeals reversed in part, finding the dismissal of R.J.'s paternity petition authorized by Ind. Code § 31-19-9-12(1) under which a putative father's consent to adoption is implied if a putative father fails to timely file a motion to contest the adoption. The Court of Appeals pointed out that, pursuant to *In Re B.W.*, 908 N.E.2d 586 (Ind. 2009), a putative father must fail in both respects to file a motion contesting adoption and paternity petition. Consequently, since R.J. timely filed a paternity petition, there was no implied consent to the adoption. However, R.J. failed to register with the putative father registry within the time specified by Ind. Code § 31-19-5-12. Notably, even if R.J. had timely registered with the putative father registry, the Court of Appeals reasoned that his paternity petition likely was time barred under Ind. Code § 31-14-5-3(b). To the paternity petition involving E.L. as a co-petitioner as next friend, R.J., however, the Court of Appeals pointed out that no Indiana statute sets forth applicable grounds for dismissing a paternity filed on behalf of a minor by a next friend. Noting the apparent anomaly that a putative father barred by one statutory section from petitioning for paternity on his own behalf may nevertheless succeed in filing of a different statutory section, the Court of Appeals harmonized the statutes and determined that a reversal of the dismissal of the petition filed on behalf of E.L. was warranted.

4. *In re Adoption of S.A.*, 918 N.E.2d 736 (Ind. Ct. App. 2009), *trans denied* 929 N.E.2d 789 (Ind.). V.A. gave birth to S.A. on March 5, 2005. Immediately thereafter, S.A. aspirated meconium and became a CHINS because of the hospitalization. The Indiana Department of Child Services ("DCS") placed S.A. in a foster home with M.H. and C.H. After learning that S.A. had been placed in foster care, C.R. (who had ultimately adopted S.A.'s teenage children) contacted the DCS and requested that S.A. be placed with her. However, DCS informed C.R. (who lived in Chicago, Illinois) that placement would not occur because the initial plan was for reunification with S.A. Sometime in 2006, the permanency plan was changed to adoption because V.A. was unable to complete the services that DCS offered and could not provide a stable lifestyle to care for S.A. On May 18, 2006, DCS filed a petition to sever the parental rights of V.A. and S.A.'s biological father. The trial court terminated their parental rights on January 4, 2007. Prior to that hearing, V.A. attempted to consent to C.R.'s adoption of S.A. On July 24, 2007, M.H. and C.H. filed an adoption petition. On May 29, 2009, the trial court ordered the adoption of S.A. by C.R. The Indiana Court of Appeals affirmed, finding that the trial court entered the specific findings for adoption required in Ind. Code § 31-19-11-1. The Court of Appeals also found that DCS's consent to the adoption was unnecessary. The Court of Appeals also determined that that trial court properly found that all provisions of the Interstate Compact on the Placement of Children (set forth in Ind. Code § 31-28-4-1) were satisfied. Finally, the Court of Appeals rejected both standing and sufficiency of the evidence arguments.

5. *In re Paternity and Maternity of Infant R*, 922 N.E.2d 59 (Ind. Ct. App. 2010). T.G. and V.G. (husband and wife) agreed with D.R. (V.G.'s sister) that their embryo would be implanted into D.R. D.R. gave birth to Infant R in February 2009. T.G. executed a paternity affidavit acknowledging his paternity of Infant R. On March 26, 2009, the trial court concluded that Indiana law does not permit a non-birth mother to establish paternity. The Indiana Court of Appeals reversed. In its analysis, the Court of Appeals acknowledged that no legislation

specifically provides for the establishment for maternity. Recognizing reproductive technologies not contemplated by statute, however, the Court of Appeals found that the public policy embodied in the paternity statutes suggested that equity should provide an avenue for relief. The Court of Appeals cautioned that the presumptive relationship of maternity will stand unless a party proves by clear and convincing evidence that she is the biological mother.

6. *In re Adoption of L.D.*, 925 N.E.2d 734 (Ind. Ct. App. 2010), *trans granted* 908 N.E.2d 797 (Ind.). On March 1, 2003, while incarcerated, the mother gave birth to L.D. The mother was unmarried at the time. Shortly after birth, N.E., a co-worker of the mother, obtained guardianship of the child. On August 9, 2003, the paternal grandparents filed a petition to adopt the child. In December 2004, the trial court approved an agreed entry under paternity and guardianship cause numbers that dissolved any guardianship of the child, awarded joint legal custody of the child to the paternal grandparents and the mother, awarded physical custody of the child to the paternal grandparents with parenting time to the mother (which would be supervised by N.E.), and non-custodial parenting time to N.E. On April 15, 2005, N.E. adopted the mother. In June 2006, the trial court entered and approved another agreed entry that modified the prior agreed entry by terminating the mother's parenting time and adapting N.E.'s parenting time to that, essentially, under the Indiana Parenting Time Guidelines. On August 23, 2007, the paternal grandparents again filed an adoption petition. The mother had been incarcerated and her whereabouts were unknown, and the paternal grandparents sought service by publication. The trial court subsequently granted the adoption, and the paternal grandparents informed N.E. that her parent visitation would be phased out. The trial court denied a subsequent motion to set aside the adoption. The Indiana Court of Appeals affirmed and denied the motion to set aside the adoption. In the process, the Court of Appeals dismissed the appeal as to the failure of her to consent, found that the service by publication was adequate, rejected the notion that N.E. should have been given notice as a grandparent, and declined N.E.'s request for visitation under the Grandparent Visitation Act because the adoptive parents (the paternal grandparents) were neither stepparents nor biologically related to the child before the adoption.

7. *J.M. v. M.A.*, 928 N.E.2d 236 (Ind. Ct. App. 2010). The father and the mother began a relationship in 1998. At the time the relationship began, the mother was four months pregnant and each party was aware that the father was not the biological father of the child. On January 7, 1999, the mother gave birth to W.H. and the father signed an affidavit of paternity acknowledging that he was the "natural father" of the child. At the time the father signed the paternity affidavit, he was 6 days away from his 18th birthday and stated that he signed the paternity affidavit because he was told it was necessary to allow W.H.'s grandmother to establish a guardianship over the child. Sometime thereafter, the grandmother was granted guardianship over W.H. On April 7, 2009, the state of Indiana filed a Petition for Entry of Support and Health Insurance Coverage. This petition ensued after the grandmother applied for benefits on behalf of W.H. The father received notice of the hearing, sought a continuance, and had that request denied by the trial court. On May 22, 2009 trial court conducted a hearing and entered a default judgment, adjudicating the father as W.H.'s father and ordering him to pay $47.00 per week in child support. A compliance and a child support modification hearing was set for July 10, 2009. On July 8, 2009, the father filed a motion to continue the compliance hearing, which was

granted. At the September 15, 2009, compliance hearing, the father established that at the time he signed the paternity affidavit he was under 18 years of age. Additionally, the mother testified that the father was not W.H.'s biological father and that the father was aware of that fact at the time he signed the paternity affidavit. The trial concluded that the father had ratified the paternity affidavit and ordered that the father continue to pay $47.00 a week in child support plus $10.00 toward a $663.48 arrearage. The Indiana Court of Appeals reversed and remanded with instructions that the trial court vacate its order adjudicating the father as the legal father of W.H. and ordering him to pay child support, as well as to set aside the paternity affidavit. The Court of Appeals found that the father had established excusable neglect under Ind. Trial Rule 60(B) and that he had a meritorious claim or defense. As to the father's execution of the paternity affidavit, it concluded that a material mistake of fact existed at the time the father executed the paternity affidavit, and that the father had not "ratified" the paternity affidavit. The Court of Appeals also encouraged the use of genetic testing in paternity actions.

8. *In re Adoption of D.C.*, 928 N.E.2d 602 (Ind. Ct. App. 2010). The biological father alleged that the children who were adopted were subject to the Indian Child Welfare Act ("ICWA"). The trial court determined that Sitka tribe of Alaska could intervene and be heard regarding the potential application of the ICWA. On May 10, 2007, the trial court found the ICWA inapplicable because the proposed adoption would not cause removal from an Indian home. On June 29, 2009, the trial court granted the adoption. The Indiana Court of Appeals affirmed, finding that the ICWA was applicable and affirming that the biological father failed to support the child as required by Ind. Code § 31-19-11-1, thus obviating the need for his consent. Judge Barnes concurred, noting that Indiana is in the minority position in applying the "existing Indian family" doctrine under the ICWA.

9. *Schmitter v. Fawley*, 929 N.E.2d 859 (Ind. Ct. App. 2010). On May 15, 1973, Schmitter filed a paternity action against Fawley while pregnant with Hans. Hans was born on September 16, 1973. On March 8, 1974, Fawley filed a motion to continue the paternity action due to his service in the Navy in the Vietnam war. On February 22, 1975, Peggy married Stephen, and Stephen filed a petition to adopt Hans. The trial court subsequently entered an order that Stephen had adopted Hans. On June 22, 2009, Hans and Peggy filed a request that the paternity proceed. On September 4, 2009, Fawley filed motions to dismiss and for summary judgment. On December 4, 2009, the trial court issued an order granting Fawley's motion to dismiss and for summary judgment. The Indiana Court of Appeals affirmed, rejecting the contention that the adoption was void. Reasoning that the adoption, at most, was voidable, thus undercutting Peggy's argument, the Court of Appeals also rejected as leading to a "patently absurd and unjust result" permitting genetic testing under Ind. Code § 31-14-6-1 in cases where there is no legitimate change of establishing paternity.

10. *In re Paternity of K.D.*, 929 N.E.2d 863 (Ind. Ct. App. 2010). The mother gave birth to K.D. on May 17, 2001. The following month, B.D. filed a paternity affidavit acknowledging paternity of K.D. and the parties filed a joint petition to establish paternity and support. The trial court approved the petition, awarded legal and physical custody to the mother, and scheduled parenting time for the father. The parents' romantic relationship ended in 2003. In December

2004, the mother alleged that the father had sexually abused K.D. That contention proved unsubstantiated, and on April 21, 2005, the father filed a petition to modify custody. On August 27, 2007, the trial court granted the father's petition and awarded him custody of K.D. In November 2007, the mother took K.D. to Community North Hospital and a case worker determined that the mother's allegation of sexual abuse of K.D. was substantiated. As a result of this allegation, the trial court placed K.D. with her maternal grandmother and the state of Indiana filed a petition alleging K.D. to be a CHINS. The trial court subsequently found that the sexual abuse allegations were unsubstantiated and that the CHINS action was no longer pending, returning K.D. to the father's custody. Believing that the courts were not protecting K.D., the mother filed a "judicial complaint". She also went to the *Indianapolis Recorder* which printed a series of three articles in which the mother renewed her allegation that the father had sexually abused K.D. On February 19, 2009, the father filed two contempt petitions, alleging in part that the mother was in contempt for having discussed the trial court's custody order and on-going proceedings with the *Indianapolis Recorder*. On February 24, 2009, the trial court issued a confidentiality order. On June 30, 2009, the trial court denied the father's contempt petition, but prohibited the mother from talking to the media about the case. The Indiana Court of Appeals reversed, determining that the mother's statements to the media constituted political speech protected by the First Amendment to the United State Constitution and that the trial court's order was a prior restraint free speech. That prior restraint, the Court of Appeals concluded, did not infringe on the father's right to privacy or the legislated confidentiality of juvenile records. Effectively, Ind. Code §§ 31-39-1-1, 2 are construed to prohibit a parties' disclosure of the contents of records listed in Ind. Code § 31-39-1-1 if the contents of the records were learned in the course of the judicial proceedings or from the documents themselves. Any independently obtained knowledge of incidents or facts that underlie court proceedings cannot be subject to a prior restraint. The Court of Appeals instructed the trial court to enter a new order prohibiting the mother from disclosing to the media or anyone else information that the mother learned exclusively through the juvenile proceedings, and from disclosing K.D.'s name or using a pseudonym similar to K.D.'s name.

11. *In re Adoption of A.M.*, 930 N.E.2d 613 (Ind. Ct. App. 2010). On September 30, 2009, the trial court entered a decree of adoption granting the maternal grandfather's petition for adoption. The order said that the mother was not divested of her maternal rights due to the fact that she and her father were not married. On October 26, 2009, the trial court vacated its order, stating that it was entered in error. On November 17, 2009, the grandfather filed a motion to correct error and argued that the father's attendance at any hearing was not required or necessary. On December 23, 2009, the trial court denied the grandfather's motions. On appeal the issue was whether the trial court erred in denying grandfather's petition to adopt his grandchild. The Indiana Court of Appeals reversed, in the process analyzing *Adoption of M.M.G.C*, 785 N.E.2d 267 (Ind. Ct. App. 2003) *and In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004). Those opinions caused the Court of Appeals to interpret Ind. Code §§ 31-19-15-1, 2. Focusing on the overarching consideration of the best interests of the child, the purposes of the adoption statutes as stated by the Indiana General Assembly, and the trial court's initial determination that the adoption was in the best interest of the child, the Court of Appeals concluded that preventing the adoption in this specific case, on the basis of Ind. Code §§ 31-19-15-1, 2 would cause an

"absurd result" not intended by the Indiana General Assembly. Judge Najam dissented, finding that the recent line of appellate opinions had stretched the adoption statutes beyond their plain meaning. Judge Najam reasoned that, while the record clearly supported the conclusion that the grandfather's adoption would be in the best interest of the child, and that the grandfather was ready to adopt, the adoption was not authorized by statute.

12. *In re Adoption of H.L.W.*, _____ N.E.2d _____ (Ind. Ct. App. 2010) (No. 71A03-0911-CV-516). The child was born on March 21, 2006, and tested positive for cocaine and benzodiazepines. The mother admitted to using crack cocaine repeatedly during her pregnancy. The Indiana Department of Child Services ("DCS") filed a petition alleging that the child was a CHINS. DCS subsequently filed a petition to terminate the mother's parental rights, which petition was granted in September 2006. The father established paternity and, in July 2006, was ordered to pay $41.00 in child support. Despite the reunification plan for the child with the father, in April 2009, the foster parents filed a petition to adopt the child. The father and DCS filed motions to contest the adoption. In November 2009, the trial court granted the foster parents' petition to adopt the child. The trial court found that the father's consent to the adoption was not required. DCS filed a motion to stay the adoption proceedings pending appeal, and the trial court granted the motion. The Indiana Court of Appeals reversed, finding that the CHINS plan of reunification was relevant in determining whether DCS's refusal to consent to the adoption was reasonable and that the trial court had jurisdiction under Ind. Code § 31-19-9-1 *et seq.* The Court of Appeals further assessed that the father had substantially complied with DCS's requirements to gain custody of his child, and that DCS met its burden of demonstrating by clear and convincing evidence that its withholding of consent to the adoption was in the child's best interests.

13. *Regalado v. Estate of Regalado*, ____ N.E.2d ____ (Ind. Ct. App. 2010) (No. 64A05-0911-CV-972). In 1991, Joseph suffered serious and permanent brain damage as the result of an altercation with officers of the Chicago Police Department. He was later adjudicated a disabled person and his father served as his guardian. On Joseph's behalf, his father brought a federal law suit against the city of Chicago. In December 2000, the lawsuit was settled for $15 million dollars. Joseph and his father later moved to Porter County, Indiana, where Joseph died intestate in October 2004. At the time of his death, Joseph owned no real property, but had $8-9 million dollars of personal property located in Indiana. Pursuant to Ind. Code § 29-1-2-1(d)(3), Joseph's estate, since he had no surviving spouse or issue, was to be distributed to his surviving parents, brothers, sisters, and issue of his deceased brothers and sisters. A few days after Joseph's death, his father filed a petition for the appointment of administrator and for supervised administration. The petition listed among Joseph's known heirs, his half-sister, Paula. Paula was born in October 1967 to a woman who was not Joseph's mother. Joseph's father and the woman married in Arizona in April 2003, when Paula was 35 years old. During the marriage, the woman lived in Arizona and Joseph's father lived in Indiana. Joseph's father commenced annulment proceedings in Indiana in 2005. The parties signed an Agreed Order of Annulment, within which Joseph's father acknowledged Paula as his biological daughter. The trial court entered an Order of Annulment in November 2005. In October 2008, one of Joseph's brothers filed a Petition to Determine Heirship, which alleged that Paula was not Joseph's half-sister. Paula filed a Motion

for Summary Judgment. Victor filed a response to Paula's Motion for Summary Judgment, but designated no evidence. The trial court granted Paula's Motion for Summary Judgment, and denied Victor's subsequent motion to correct error. The Indiana Court of Appeals reversed and remanded. As to the affidavits Victor filed with his motion to correct error, the Indiana Court of Appeals determined they were untimely filed. As to summary judgment, the Indiana Court of Appeals concluded that Paula could seek to establish paternity through Ind. Code § 29-1-2-7(b) even though she would be barred from filing the paternity action under Ind. Code § 31-14-5-2(b) since she was over 20 years of age. The Indiana Court of Appeals also determined that there was sufficient designated evidence to show that Joseph's father acknowledged Paula as his biological daughter. In an issue of first impression (whether a child must show she is born out-of-wedlock before application of Ind. Code § 29-1-2-7(b)), the Indiana Court of Appeals determined that a child is born out-of-wedlock if (1) the mother is unmarried when the child is born or (2) the mother is married when the child is born, but the mother's husband is not the child's biological father. Noting that Joseph's father and Paula's mother were not married at the time of Paula's birth, Paula was a child born out-of-wedlock. The Court of Appeals then concluded that the designated evidence was insufficient to prove as a matter of law that Joseph's father was Paula's father. Joseph's father's acknowledgment of Paula did not alone establish him as her biological father. The genetic test did not compare the DNA of Paula and Joseph's father to determine the probability of paternity. As a result, Paula had not designated sufficient evidence to show that there is no material issue that she is a child born out-of-wedlock. The Court of Appeals also refused to apply the doctrine of collateral estoppel based on the Agreed Order of Annulment in the annulment action.

G. TERMINATION OF PARENTAL RIGHTS/CHINS

1. *In re J.J.*, 912 N.E.2d 909 (Ind. Ct. App. 2009). On April 7, 2009, the trial court held an emergency detention hearing after the Indiana Department of Child Services ("DCS") took emergency custody of J.J. and alleged him to be a CHINS. Subsequently, the trial court entered an order appointing a Guardian *Ad Litem* in the CHINS proceeding. The trial court ordered DCS to pay the Guardian *Ad Litem* $300.00 in fees within 10 days, subject to a stay pending appeal. The DCS appealed, asserting that the trial court erred in ordering it to pay any Guardian *Ad Litem's* fees pursuant to Ind. Code § 31-40-3-2. The Indiana Court of Appeals reversed, noting amendments to Ind. Code § 31-40-1-1 *et seq.* that went into effect on January 1, 2009. Those amendments, the Court of Appeals observed, did not address whether the burden of paying the Guardian *Ad Litem* fees was shifted to the state of Indiana. Rather, Ind. Code § 31-40-3-2 was not affected. That statutory provision provided that the fiscal body of a county would provide payments from a Guardian *Ad Litem* fund. Effectively, Ind. Code § 31-40-3-2 requires a county, not DCS, to pay fees related to Guardian *Ad Litem* services.

2. *In re A.H.*, 913 N.E.2d 303 (Ind. Ct. App. 2009). A.H. was born on October 10, 2008. On October 12, 2008, the Indiana Department of Child Services ("DCS") removed A.H. from the care of the mother and the father based on statements made by the nursing staff at Witham Memorial Hospital in Lebanon, Indiana. On October 14, 2008, the parents filed a request for an emergency hearing in the trial court to order the return of A.H. That day, the trial court held an

emergency hearing and released A.H. to the care of the parents. On October 15, 2008, DCS filed a CHINS petition. The CHINS petition relied upon information obtained from the nursing staff at Witham Memorial Hospital in Lebanon, Indiana, which petition stated that the parents reported they did not know how to care for A.H. because their other children were girls. The trial court held a hearing that day and found the allegations in the CHINS petition to constitute probable cause. As a result, the trial court placed A.H. in a guardianship pending a fact-finding hearing, and determined that the parents should have daily parenting time with A.H. On December 19, 2008, DCS filed a revised CHINS petition alleging that A.H. was a CHINS, based upon observations of the parents' behavior during their daily parenting time with A.H. At the fact-finding hearing in January 2009, DCS offered to evidence related to a previous CHINS adjudication regarding a child of the mother and a child of the father, separately. The trial court refused to admit that evidence under Indiana Evid. R. 403, but determined that A.H. was a CHINS. The trial court ordered that A.H. be removed from the parents' care and placed in foster care. The Indiana Court of Appeals affirmed, finding that there was sufficient evidence to support the trial court's determination that A.H. was a CHINS. The Court of Appeals noted that the CHINS statute does not require that a trial court wait until a tragedy occurs to intervene, and that the purpose of a CHINS adjudication is not to punish the parents, but to protect children. The Court of Appeals also reviewed the factual findings related to the parents' ability to care for A.H., and determined that they were not clearly erroneous.

3. *In re B.M.*, 913 N.E.2d 1283 (Ind. Ct. App. 2009). B.M. was born on August 4, 2003. The parties' divorced, and the mother was awarded sole custody of B.M. On January 3, 2006, the Indiana Department of Child Services, Vanderburgh County ("DCS") filed a petition alleging that B.M. was a CHINS. The trial court determined that B.M. was a CHINS, and B.M. was removed from the mother's custody due to the mother's cocaine addiction and relapse. On February 22, 2006, the mother appeared and signed a parental participation agreement. The father failed to appear and was defaulted. In Fall 2006, the father began to participate in the court-ordered services with a parent aide. In June 2007, the father was arrested on federal charges of conspiracy to distribute cocaine. In November 2007, B.M. was returned to the mother's care. The father was subsequently convicted of the charged offense and incarcerated. The DCS, again, removed B.M. from the mother's care in April 2008. On August 5, 2008, the DCS filed a petition to terminate the parental rights of both parents. At the termination hearing on December 15, 2008, the mother failed to appear. The father testified by telephone. The trial court terminated the parents' parental rights, and the father appealed. The Indiana Court of Appeals affirmed, rejecting the father's contention that terminating his parental rights with regard to B.M. should be set aside because the trial court failed to consider placing B.M. will the father's sister as an alternative determination.

4. *In re N.E.*, 919 N.E.2d 102 (Ind. 2010). The mother had four children from separate fathers, including N.E. who was born on January 24, 2004. In December 2007, the Department of Child Services ("DCS") filed a petition alleging that all four of the mother's children were CHINS. The trial court subsequently held a hearing at which the DCS conceded that N.E. spent a great deal of time at the home of her paternal grandmother, where N.E.'s father also lived. The trial court ordered the mother and the father to undergo DNA testing to determine the paternity

of N.E. The trial court established the father's paternity and placed N.E. in the custody of the father and the grandmother. About one week later, however, DCS filed a motion to remove N.E. from the father's and the grandmother's care on multiple bases. On February 12, 2008, the mother admitted that her children were CHINS. The father did not as to N.E., and requested the fact-finding hearing. The trial court found that N.E. was a CHINS and found N.E. to be a ward of the state of Indiana. The Indiana Supreme Court reversed, concluding that DCS had not alleged, and the trial court had not determined, N.E. to be a CHINS with respect to the father. The Supreme Court held that a CHINS determination establishes the status of a child alone, and that a separate analysis as to each parent is not required in the CHINS determination stage. In this case, the domestic violence in the mother's home served as the basis of the CHINS petition and it was not necessary for the CHINS petition to make any allegations with respect to the father. Once CHINS status has been determined, the trial court is to conduct a hearing to consider alternatives for the child's care, treatment, placement, or rehabilitation. In this case, the trial court did not address its reasons for not placing N.E. with the father. Accordingly, the Supreme Court remanded to the trial court to make a determination.

5. *In re M.B.*, 921 N.E.2d 494 (Ind. 2009). The mother gave birth to M.B. in March 2000 and S.B. in June 2002. The Howard County Department of Child Services ("DCS") removed both children from the mother in August 2002 because she had been arrested on drug charges and no suitable family members were available to care for the children. The mother was released from incarceration in October 2005. DCS petitioned for the involuntary termination of the mother's parental rights on March 19, 2007. On April 9, 2007, the trial court held an initial hearing and set the matter for a fact-finding hearing on June 4, 2007. Prior to the fact-finding hearing, mother, advised by her counsel, executed a voluntary relinquishment of parental rights form for each child. She also consented to adoption. The trial court accepted the mother's voluntary termination of parental rights and accepted the post-adoption visitation addendum. On September 10, 2007, a three-month CHINS periodic review hearing was held in which it was recommended that the mother's visitation privileges be terminated. The trial court terminated the mother's visitation privileges. On February 5, 2008, the mother filed a motion to set aside the initial order for voluntary termination of parental rights, pursuant to Ind. Trial Rule 60(B). The Indiana Supreme Court affirmed the trial court's acceptance of the mother's voluntary termination of parental rights, reversed the trial court's decision to terminate the mother's visitation rights at the three-month CHINS review hearing, and remanded to the trial court with instructions that should DCS continue to seek termination of the mother's visitation rights, the trial court consider the request at hearing that accords with legal requirements. The Supreme Court held that, unless all of the provisions of Indiana's Open Adoption Statutes (Ind. Code §§ 31-19-16-1, 2) are satisfied, the voluntary termination of parental rights may not be conditioned upon post-adoption contact privileges. The trial court was instructed to determine whether continued visitation by the mother was in the children's best interests. Justice Boehm concurred in the result, but did not agree that a consent with an invalid condition is nonetheless a consent. He would have resolved the mother's claim as a matter of contract.

6. *In re S.W.*, 920 N.E.2d 783 (Ind. Ct. App. 2010). In affirming a CHINS determination, the Indiana Court of Appeals affirmed the trial court's admission of evidence of S.W.'s drug use.

The Indiana Court of Appeals distinguished between evidentiary rulings in delinquency proceedings and those in CHINS or equivalent child protection actions. No authority exists supporting a claim that the Indiana Department of Child Services cannot have a child in its custody submit to a drug test.

7. *Termination of Parent-Child Relationship of I.B. v. Indiana Dept. of Child Services*, 922 N.E.2d 62 (Ind. Ct. App. 2010), *trans granted* 929 N.E.2d 793 (Ind.). The issue presented was whether the trial court properly denied a motion to appoint appellate counsel to appeal the termination of the mother's parental relationship with I.B. The Indiana Court of Appeals affirmed, beginning its analysis under Ind. Code § 31-32-2-5, which states that a parent is entitled to representation by counsel in termination proceedings. That statutory provision does not address the right to counsel in an appeal. As to the mother's focus on Ind. Code § 31-32-4-3(b), that statute provides for the appointment of counsel in other proceedings is discretionary. Likewise, Ind. Code §§ 34-10-1-1, 2(b), 2(c) do not provide a basis for the appointment of appellate counsel.

8. *In re Termination of the Parent-Child Relationship of K.L.*, 922 N.E.2d 102 (Ind. Ct. App. 2010). The mother and the father were the parents of K.L., born March 11, 2008. Prior to K.L.'s birth, the Fountain County Department of Child Services ("DCS") removed the mother's two older children from her care due to allegations of neglect. K.L. was determined to be a CHINS. On June 25, 2008, DCS placed K.L. in the care of the father's sister and her husband. The father continued to supervise weekly visits with K.L. On February 6, 2009, both the father and the mother requested DCS file voluntary petitions to terminate their parental rights. The trial court repeatedly expressed its reluctance to allow the father to proceed at the termination hearing without counsel. The father declined the trial court's offer and repeatedly indicated that he did not desire counsel. The trial court terminated parental rights, and authorized the adoption of K.L. to the father's sister and her husband on February 16, 2009. On March 27, 2009, DCS removed K.L. from the father's sister and husband's home and withdrew its consent to their adoption. On April 13, 2009, the father sought to set aside the judgment terminating his parental rights. The trial court denied the father's request, and he appealed. The Indiana Court of Appeals reversed, finding that public policy regarding parents' rights to establish a home and raise their children weighed in favor of setting aside the judgment terminating the father's parental rights. The Court of Appeals founds that the genuine understanding of all parties was that the father's sister and her husband would adopt K.L. The parties labored under the misrepresentation made in the Home Study Report that there were no DCS records against the father's sister or husband that would prevent K.L.'s placement in their home or their subsequent adoption of K.L. The misrepresentation by an employee of DCS led to the setting aside of the judgment terminating the father's parental rights. *See also In re A.K.*, 924 N.E.2d 212 (Ind. Ct. App. 2010) affirming the termination of parental rights on the basis of clear and convincing evidence *and In re A.B.*, 924 N.E.2d 666 (Ind. Ct. App. 2010) affirming the termination of parental rights based on sufficiency of evidence.

9. *Bennett v. Richmond*, _____ N.E.2d _____ (Ind. Ct. App. 2010) (No. 20A03-0906-CV-285). In this important evidentiary opinion, the Indiana Court of Appeals reversed the trial

court's admission of testimony of a psychologist on the basis that the psychologist's testimony that the plaintiff sustained a brain injury as a result of an accident went beyond determining the etiology of brain injuries to causation. In essence, the psychologist attempted to give testimony that only a medical doctor could give as to causation. The Court of Appeals also stated that even if the psychologist were qualified to give causation testimony in this appeal, his testimony was lacking probative value.

10. *In re C.G.*, ____ N.E.2d _____ (Ind. Ct. App. 2010) (No. 49A04-1002-JT-75). C.G. was born in December 2000. In January 2008, the mother went to Utah and left C.G. in Indianapolis in care of her boyfriend. During her visit to Utah, the mother was arrested. While incarcerated in Utah, the mother contacted her boyfriend and asked him to take C.G. to a neighbor in Indianapolis. The neighbor was not related to C.G. by blood or marriage. C.G. lived with the neighbor from January 2008 until mid-April 2008. The mother could not contact C.G. or the neighbor during this time because she did not know the neighbor's mailing address. Following Easter 2008, the boyfriend picked C.G. up and took him from the neighbor's home on a trip. They were gone for 5 to 7 days. When they returned on April 16, 2008, the neighbor left C.G. with one of the neighbor's neighbors. The neighbor retrieved C.G. from her neighbor's home within a few hours. C.G. told the neighbor that she did not feel good and that "her privates" hurt. The neighbor took C.G. to the hospital that same day, where doctors determined that C.G. had herpes and had been sexually abused. After C.G. was released from the hospital, the Marion County Department of Child Services ("DCS") placed C.G. in foster care. C.G. remained in foster care with the same family. On April 18, 2008, DCS filed a petition alleging that C.G. was a CHINS. The CHINS court appointed a Guardian *Ad Litem* for C.G., and ordered that C.G. would remain in the custody of DCS. Subsequently, the trial court issued a dispositional order formally removing C.G. from the mother's care and making C.G. a ward of DCS. In the dispositional order, the trial court further stated that no services would be offered to the mother "until she appears before the Court." At that time, the permanency plan for C.G. remained reunification with her parents. On March 25, 2009, the trial court held a hearing and authorized DCS to change C.G.'s permanency plan to adoption by the foster parents. That same day, DCS filed a petition to terminate the parent-child relationship of the mother and C.G. On April 7, 2009, DCS filed notice with the trial court indicating that the mother had requested a public defender. A public defender was appointed and subsequently appeared in the CHINS proceedings. The mother participated in both days of the final termination hearing telephonically, with translators in the courtroom because the mother did not speak or understand English. The mother was represented by counsel on both days. The mother testified that she had been found guilty in her federal criminal case and could serve from ten years to life for her conviction. On January 11, 2010, the trial court issued findings and conclusions terminating the parent-child relationship between the mother and C.G. The Indiana Court of Appeals affirmed, finding that the mother's due process rights were not violated by DCS. The Court of Appeals also affirmed the trial court ruling in having the mother attend the final hearing dates telephonically. The Court of Appeals indicated it was troubled by the Marion Superior Court's policy, and that it could see situations where an incarcerated parent's in-person participation in a termination proceeding would be necessary. In this case, however, the Court of Appeals determined that the mother's due process rights were not significantly compromised by her

telephonic participation in the final hearing, nor did the denial of the mother's continuance motion and exclusion of certain evidence constitute reversible error. Finally, the Court of Appeals determined that the evidence was sufficient to support the termination of the mother's parental rights.

III. LEGISLATION

Attached are the most pertinent 2010 legislative amendments to the Indiana Code affecting family law matters.

IV. INDIANA CHILD SUPPORT GUIDELINES

On September 15, 2009, the Indiana Supreme Court issued its Order Amending Indiana Child Support Rules and Guidelines ("Order"). This order offered a major revision to the Indiana Child Support Rules & Guidelines ("Guidelines") effective January 1, 2010. The Guidelines, enacted in 1989 and reviewed every 4 years pursuant to Federal law, are mandatory for causes of all nature involving child support. Prior to the Guidelines, child support calculations could vary widely, from county to county and court to court. An 18-month sojourn led to recommendations from the Domestic Relations Committee of the Indiana Judicial Conference which eventually, in largely unedited form, made its way into the Order. The following summary addresses the major amendments to the Guidelines and certain rationale underlying the changes.

a. Changes to Gross Weekly Income. Guideline 3.a. defines "Weekly Gross Income" for child support purposes. Specifically, Guideline 3.a.1. largely incorporates developed case law to provide that Social Security Disability Benefits paid for the benefit of a child are includable in the Disabled Parent's Weekly Gross Income. In offsetting fashion, however, the disabled parent also is entitled to a credit equaling the amount of that benefit. Social Security Disability Benefits received for the benefit of a child as a result of a custodial parent's disability are not a credit toward the child support obligation of the non-custodial parent. Social Security Benefits received by a custodial parent on behalf of a child, but arising from the earnings or disability of the non-custodial parent, are credited to the non-custodial parent's child support obligation in certain instances. For example, the credit is a discretionary if a child is receiving Social Security Retirement Benefits as a result of the non-custodial parents' retirement. The credit is automatic by virtue of the methodology set forth above (*e.g.*, including the payment in the non-custodial parent's gross income, but giving the non-custodial parent an automatic credit against his child support obligation in the same amount) if a child is receiving Social Security Disability Benefits as a result of non-custodial parent's disability. In the event of a lump-sum retroactive Social Security Disability payment following a disability determination, to the extent that payment is made to the non-custodial parent, it is applied to any child support arrearage and any excess is considered a gratuity without refund to the non-custodial parent or credit to the non-custodial parent's future child support obligations.

Guideline 3.a.3 now provides that "potential income" is attributable to a parent only when unemployment or underemployment is "without just cause". There is significant Commentary to this Guideline discussing the reasons for the unemployment or underemployment (such as whether it results from a health issue, disability, child care costs, or similar circumstances). The Commentary suggests that there are circumstances when it is improper to impute any income to a parent. Query whether imputing minimum wage to an unemployed or underemployed parent is now always appropriate. Tracking the Indiana Supreme Court decisions as to incarcerated persons (*Lambert v. Lambert*, 861 N.E.2d 1176 (Ind. 2007) and *Becker v. Becker*, 902 N.E.2d 818 (Ind. 2009)), trial courts are now limited in imputing potential income to incarcerated persons.

The methodology of accounting for subsequent children is altered, although there is no practical impact. Rather than using a multiplier on Line 1 of the Child Support Obligation Worksheet to reduce a parent of subsequent children's Weekly Gross Income, a new Line 1.a. is added to the Child Support Obligation Worksheet for a credit against Weekly Gross Income for subsequent children. The credit line permits for up to eight subsequent children, while the prior multiplier addressed only five or fewer subsequent children.

b. Elimination of Child Support Plateau for High Income Earners. The Domestic Relations Committee of the Indiana Judicial Conference engaged Dr. Jane Venohr, a noted child support expert from Colorado, to assess the Dr. Venohr concluded that orders under the prior Guidelines were too high at low income levels, and too low at high income levels. As a result, the amendments to the Guidelines lower scheduled child support amounts for the incomes in the range of $100.00 to $480.00 per week. For incomes less than $100.00 per week, individual circumstances must be considered. Dr. Venohr's data supported the conclusion that an amount of no more than $12.00 per week was appropriate for a "minimum child support", and that sometimes a zero child support order is appropriate. If there is a zero child support order, the obligation should be expressed as $0.00. This changes Indiana's prior $25.00 per week minimum child support order –an order that was one of the highest in the nation. F or calculation purposes, note that the current minimum wage (effective July 24, 2009) is $7.25 per hour or $290.00 per week. The current Federal poverty level for one person is $200.00 per week (as opposed to the $100.00 per week level in $1989 when Indiana first adopted the Guidelines).

Guideline 3.d. makes substantial changes to the method of calculating child support of high income earners. The new schedules for child support have grown to $10,000.00 per week (as opposed to $4,000.00 per week under the old guidelines). For incomes in excess of $10,000.00 per week, rather than applying the trigonometrically-flat line prior formula, basic child support obligations will increase at a fixed percentage of the income above $10,000.00 per week, depending on the number of children (*e.g.*, 7.1% for one child, 10% for two children, 11.5% for three children, 12.9% for four children, etc.). The impact of this calculation is to double, triple, or quadruple child support in many instances for high income earners.

c. Rebuttable Presumption for Child Support Payments from Custodial Parent. Guideline 3.F. has new language that provides that, when a child support calculation

produces a "negative" support amount for the non-custodial parent, there is a rebuttable presumption that the custodial parent shall pay to non-custodial parent child support equal to the "negative" support figure. This new Guideline effectively overrules interpretation of the prior Guideline set forth in *Grant v. Hager*, 868 N.E.2d 801 (Ind. 2007). Note, however, that Justices Sullivan and Rucker expressly dissented to this revision in the Order and would have affirmed the *Grant* holding that there is no rebuttable presumption.

d. Retroactivity of Child Support. Guideline 4 Commentary adopts the holding of *Whited v. Whited*, 859 N.E.2d 657 (Ind. 2007), in stating that a modification of child support may not be made retroactive to a date earlier than the date of the Petition to Modify except if (1) the parties have agreed to and carried out an alternative method of payment that substantially complies with the spirit of the divorce decree, or (2) the parent obligated to pay child support assumes physical custody of a child, provides necessities, and exercises parental control for a period of time that is tantamount to a permanent change of custody. The Guidelines also provide Commentary as to how to address a reduction in child support when an older child is emancipated, specifically adding that child support orders may be framed to allow for an automatic in adjustment in child support when an older child is emancipated. The Guidelines note, however, that this practice is an exception and not a rule. Practically, it codifies what many parties do in their divorce decrees.

e. Controlled Expenses. A new Guideline 6 addresses the Parenting Time Credit (as opposed to being part of Guideline 3.g.). One of the vexing issues was the prior reference to "controlled expenses". "Controlled expenses" are expenses that are not transferred to or duplicated by the other parent. The Commentary identified "controlled expenses" as "clothing, education, school books and supplies, ordinary uninsured health care and personal care." The Commentary states that "controlled expenses" are not an issued unless there is equally-shared physical custody. In that situation, one parent should be designated as the parent to pay the "controlled expenses," with the other parent given the Parenting Time Credit. The Commentary also gives guidance as to which parent should pay the expenses in the equally-shared physical custody situation. Those factors include which parent hose traditionally paid the expenses, which parent is more readily able to pay these expenses, which parent more frequently takes the child to providers, and which parent traditionally has been more involved in school activities.

f. New Health Care and Medical Support Guideline and Worksheet. Guideline 7 and a new worksheet addresses the feasibility of obtaining insurance coverage. The new Guideline mandates health insurance coverage where feasible, with the Health Insurance Premium Worksheet providing a test to determine whether to include a private health insurance requirement as a part of trial court's order. The test is in four parts:

(1) Is private health insurance for the children available to the parent,

(2) Would the premium to cover the children be less than 5% of that parent's Weekly Gross Income,

(3) Would the premium to cover the children and the addition of the parent's share of the basic child support obligation be equal to or less than 50% of that parent's Weekly Gross Income, and

(4) Would the coverage for the insurance be accessible to the children.

The Health Insurance Premium Worksheet need not be completed when the parents agree that one or both of them will provide health insurance for the children. If there is no agreement and neither parent meets the standard under the Health Insurance Premium Worksheet, the trial court can order an investigation to determine whether coverage is appropriate. Likewise, the trial court may order both parents to carry health insurance coverage for children when the parents have a history of changing employment or insurance providers. The "6% Rule" is retained under the new Guidelines, with additional language that fathers pay a percentage of extraordinary birthing expenses.

g. Extraordinary Expenses. Rather than being part of the prior Commentary, Guideline 8 now exists to cover "extraordinary expenses" such as extracurricular activities, private schooling, and college. As to elementary and secondary school education, the trial court has discretion to order the parents to pay these costs, but is instructed to consider the preferences of the parties, quality of alternative education, and what the parties would have done if the family had remained intact. As to college, that an order for payment remains discretionary, Guideline 8.b. encourages child contribution to these costs, as well as an academic performance requirement. The Guideline also requires the student or custodial parent to provide copies of the report cards to the parents (or non-custodial parent). There is also reference to limiting the cost to that of a State-supported institution. The Guideline also addresses the possibility of apportioning costs for camps, sports, and similar extraordinary expenses, with consideration given to each parent's ability to pay, which parent is encouraging the activity, whether the children have historically participated in the activity, and the reason a parent encourages or opposes participation in the activity.

h. Accountability and Tax Exemptions. Guideline 9 is created to spell out language formerly in the Commentary to the prior Guideline 6. The text remains the same, with the exception that child support order should be rounded to the nearest dollar, as set forth on the Child Support Obligation Worksheet.

Although discussed during the deliberations, the Guidelines are silent as to whether the adoption of the new Guidelines without more is grounds for a modification. Ind. Code § 31-16-8-1, suggests that, at least for high income earners, modifications may emanate from only an amendment to the Guidelines if the "20% Test" is met.

V. CONCLUSION

The Indiana Court of Appeals and Indiana Supreme Court continue to address many issues of import to Indiana families in "For Publication" opinions. "Not for Publication"

opinions also contained many nuggets of guidance, despite their lack of precedential value. Given the rapidity which decisions are made by the state's appellate courts and the tackling of issues fundamental to Indiana families, Indiana continues to buffer its population from contested and protracted litigation.